91-1392

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

HOMEBUILDERS ASSOCIATION OF BUCKS/
MONTGOMERY COUNTIES, INC.,
and
TRAPPE MEADOWS, INC.,

Petitioners,

v.

BOROUGH OF TRAPPE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Fifth Amendment to the United States Constitution permit a property owner to assert a "Taking Claim" in a United States District Court when a condition placed upon the issuance of a development permit, imposed under a municipality's police power, does not substantially advance a legitimate state interest, without first seeking compensation under state eminent domain procedures?

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that the determination of whether governmental action was rational and non-arbitrary be based upon facts and circumstances actually considered by the governmental officials in taking such action?

LIST OF PARTIES

The parties to the proceeding below were the Petitioners, Homebuilders Association of Bucks/Montgomery Counties, Inc. and Trappe Meadows, Inc. and the Respondent, the Borough of Trappe. An amicus curiae brief in support of the Petitioners was filed by the National Association of Homebuilders. Petitioners Homebuilders Association of Bucks/Montgomery Counties, Inc. and Trappe Meadows, Inc. are both privately held corporations and have no publicly owned parent, subsidiary or affiliate companies.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Homebuilders Association of Bucks/ Montgomery Counties, Inc. and Trappe Meadows, Inc. respectfully pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Third Circuit entered on November 29, 1991.

OPINION BELOW

The decision of the United States Circuit Court of Appeals for the Third Circuit ("Court of Appeals"), whose judgment is herein sought to be reviewed, was issued on November 29, 1991, and is reprinted in the Appendix at A-1. The Court of Appeals affirmed, without

opinion, the decision of the United States District Court for the Eastern District of Pennsylvania (the "District Court"). The District Court's opinion and order are not reported, and are reprinted in the Appendix at A-3.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). Petitioners seek review of a decision by the Court of Appeals affirming the dismissal by the District Court of claims made by Petitioners arising under the United States Constitution and federal law. The Court of Appeals denied Petitioners' appeal on November 29, 1991. This Petition has therefore been timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law, nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

> process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

The statutory provision involved in the case, 42 U.S.C. §1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

THE CHALLENGED ORDINANCES

The two ordinances enacted by the Borough of Trappe that are in issue in this Petition are the Building Permit Ordinance and the Capital Contribution Ordinance (as both are hereinafter defined). Due to the length of each of those ordinances, the body of those ordinances are not recited herein but are reprinted in their entirety, in the Appendix at A-32 and A-56 respectively.

STATEMENT OF THE CASE

This Petition seeks review of the decision of the Court of Appeals affirming the District Court's dismissal and/or denial of Petitioners' challenges to the constitutional validity of three separate fees imposed upon Petitioners as a condition to receiving a building permit

from the Respondent, the Borough of Trappe (hereinafter referred to as the "Borough") under two separate ordinances enacted by the Borough (hereinafter sometimes collectively referred to as the "Challenged Ordinances"). The Challenged Ordinances, both of which were enacted under the guise of the Borough's police power, require that the builder of new homes in the Borough make a series of payments to the Borough as a condition of obtaining a building permit from the Borough.

On or about July 7, 1987, the Borough enacted Ordinance No. 240, which adopted a Building Code for the Borough (the "Building Permit Ordinance"). The Building Permit Ordinance imposes upon each applicant for a building permit, a fee equal to one percent (1%) of the value of the construction described in each building permit. The Building Permit Ordinance initially provided that the Borough Building Inspector would receive one-half (1/2) of the Building Permit fee collected from each building permit applicant, up to a maximum of $30,000.00 per year. The Building Permit Ordinance was subsequently amended to reduce the compensation of the Building Inspector to a flat salary of $10,400.00, regardless of the amount of work performed in administering building permits. However, the 1% percent Building Permit Fee imposed under the Building Permit Ordinance remained the same.

No study or investigation was performed by the Borough prior to the enactment of the Building Permit Ordinance in order to determine the Borough's actual cost of administering building permit applications. In support of its Motion For Summary Judgment submitted to the District Court, the Borough submitted an affidavit of the Borough Treasurer which sought to account for the costs incurred by the Borough in administering building permit applications. However, it was undisputed that the Borough had not made any attempt to determine or account for those costs prior to enacting the Building Permit Ordinance.

Borough records reflect that the Borough collected $56,497,38, $32,981.60 and $44,447.78 in Building Permit Fees for years 1987, 1988 and 1989 respectively, and that those fees collected from building permit applicants were deposited in the Borough's general fund and used to pay general Borough expenses.

On or about September 1, 1987 the Borough enacted Ordinance No. 245, which required the payment of a capital contribution to the Borough's water system of $1000.00 ("Capital Contribution Fee") per "Equivalent Dwelling Unit" constructed by a builder of new residential, commercial or industrial buildings, to be paid at the time of building permit application. The Capital Contribution Ordinance further required the payment of an additional $700.00 fee for specifically itemized services relating to the connection of new homes to the Borough's water system (the "Tapping Fee"). On or about December 21, 1987, the Capital Contribution Ordinance was amended to increase the amount of the Capital Contribution Fee imposed upon each building permit applicant from $1000.00 per EDU to $1500.00 per EDU. The amount of the Tapping Fee remained unchanged.

The Capital Contribution Ordinance requiring the payment of the Capital Contribution Fee and Tapping Fees was enacted by the Borough without any investigation into the extent of the impact of new homes upon the Borough's existing water system, the extent or nature of capital improvements that would be necessary to the Borough's water system in order to provide water to those new homes, or the cost of any such necessary improvements. There was no investigation into the need for the imposition of a Capital Contribution Fee or a Tapping Fee, the amount that should be charged, or the use that would be made of the fees once collected.

The Borough attempted to retroactively justify the amount of the Capital Contribution Fee and Tapping Fee imposed under the Capital Contribution Ordinance in its Motion for Summary Judgment. However, as was true of the Building Permit Fee, it was undisputed that

the Borough had made no investigation prior to imposing the Capital Contribution Fees and Tapping Fees.

In addition to paying the fees required under the Capital Contribution Ordinance, each developer of a residential subdivision in the Borough is required to design, construct and connect, at its sole cost and expense, the water distribution system that will service the homes to be constructed in his development. The only services performed by the Borough in connection with the design, construction or connection of the water distribution system servicing each development is the review of plans depicting the proposed water distribution system, and the supervision of construction of the water distribution system by the developer. However, developers are required to pay the Borough directly for such services, in addition to paying the Capital Contribution Fees and Tapping Fees to the Borough.

The Borough collected $76,000.00 in Capital Contribution Fees and $27,875.00 in Tapping Fees for years 1988 and 1989. Borough records reflect that the only uses made of the fees collected under the Capital Contribution Ordinance were for improvements to the Borough's water system that are unrelated, or only marginally related to new development. No funds have ever been expended by the Borough for the "tapping" services specified in the Capital Contribution Ordinance, as the Borough requires the Developer to supply such services at its own expense, even though the Developer must pay the Tapping Fee. Moreover, Borough records reflect the the Borough has not even budgeted to expend any of the funds collected under the Capital Contribution Ordinance for capital improvements or "tapping services" in connection with new development.

Petitioners Homebuilders Association of Bucks/ Montgomery Counties, Inc ("HBA") and Trappe Meadows, Inc. ("Trappe Meadows") commenced suit in the Court of Common Pleas of Montgomery County,

Pennsylvania challenging, inter alia, the constitutionality of the Challenged Ordinances under federal law and the validity of the Challenged Ordinances under state law. The Borough removed the action to the United States District Court based upon the federal constitutional claims raised by Petitioners.

Petitioners asserted Taking claims under the Fifth Amendment based upon the failure of both of the Challenged Ordinances to substantially advance a legitimate state interest. Petitioners contend that the Building Permit Fee imposed under the Building Permit Ordinance and the Capital Contribution Fee and Tapping Fee imposed under the Capital Contribution Ordinance lack the required nexus to the interest sought to be advanced by those ordinances. The District Court *dismissed* Petitioners' Taking claims based upon Petitioners' failure to first seek compensation under the Pennsylvania Eminent Domain Code.

Petitioners asserted violations of their right to substantive due process under the Fourteenth Amendment to the United States Constitution based upon the lack of a rational basis for the enactment or application of the fees imposed under the Challenged Ordinances. The District Court granted summary judgment in favor of the Borough and against Petitioners on their substantive due process claims, finding, as a matter of law, that the Borough was not required to determine or even investigate the actual need for the fees imposed under the Challenged Ordinances prior to imposing such fees, and that as long as the Borough "rationally could have believed", in its subjective judgment, that the fees were necessary, the Challenged Ordinances were not violative of Petitioners' substantive due process rights. The Court of Appeals affirmed the District Court's decision without opinion.

REASONS FOR GRANTING THE WRIT

1. THE PETITION SHOULD BE GRANTED TO CLARIFY THE REQUIREMENTS FOR ASSERTING A TAKING CLAIM UNDER THE FIFTH AMENDMENT BASED UPON THE FAILURE OF A REGULATORY MEASURE TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST

A. This Court Has Never Directly Addressed The Issue Of Whether A Property Owner Must Seek Compensation Under State Procedures Prior To Asserting A Taking Claim In The Federal Court Based Upon The Failure Of A Regulatory Measure To Substantially Advance A Legitimate State Interest

The concept of a "Taking Claim" based upon the governmental overregulation of land originated in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). In *Pennsylvania Coal*, this Court first held that a governmental regulation restricting the use of land, but which involved no physical taking or trespass, could result in a Taking requiring the payment of just compensation. However, it was not until 1978 that this Court started to refine the criteria for such regulatory Takings. In *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), this Court stated that governmental regulation of real property may result in a Taking if: (1) such action does not substantially advance a legitimate public purpose; *or* (2) prevents the landowner from realizing any economically viable use of his property.

With the exception of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), virtually every regulatory Taking Claim addressed by this Court has involved the second method of establishing a Taking, as stated in *Penn Central*, i.e. the denial of all economically viable use of property. In *Agins v. Tiburon*, 447 U.S. 255 (1980) this Court upheld a sophisticated open space

ordinance against a landowner's claim that the ordinance denied him all economically viable use of his property, holding that a landowner must first obtain a final determination as to the use(s) to which the property can be put. This requirement was further refined in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986). In *Williamson County* this Court determined that a Taking claim, based upon the denial of all economically viable use of property, was premature, because the landowner had not applied to the government for a "hardship variance" from the strict terms of the challenged regulation, reasoning that the governmental body could avoid depriving the landowner of all viable use of his property by granting the variance. In *McDonald*, this Court dismissed a Taking claim based upon a landowner's claim that a subdivision plan was rejected because of the government's desire to create an open-space buffer and to restrict his property to an agricultural use for which it was not suited, holding that the landowner was first required to determine whether another subdivision proposal would be acceptable to the county, or, in the alternative, whether the county would be willing to pay just compensation. Thus, out of a line of cases addressing Taking Claims based upon the deprivation of all viable use of property, came the requirement that a landowner first (1) apply for all possible variances from such regulations; and (2) exhaust all state remedies, if any, for obtaining just compensation for the government's deprivation of all viable use of property.

It was not until *Nollan v. California Coastal Commission*, supra. that this Court first addressed the other type of Taking Claim described by this Court in *Penn Central Transportation Company v. New York City*, supra. – the failure of a governmental regulation to substantially advance a legitimate state interest. In *Nollan*, this Court determined that a condition imposed

upon the issuance of a development permit by the California Coastal Commission lacked a substantial relationship to the achievement of a legitimate governmental interest and constituted a Taking without just compensation. Significantly, in Nollan, the landowner had not first sought a variance from the requirements of the challenged ordinance, nor first sought compensation under state procedures. This Court's decision in *Nollan* does not address these failures. Accordingly, although the Court has never directly addressed this issue, this Court has, at least by implication, restricted the "exhaustion of state remedies requirement" to Taking claims based upon the denial of all economically viable use of property and has not applied this requirement to Taking claims based upon the failure of a governmental regulation to substantially advance a legitimate state interest.

B. There Is An Apparent Split Of Authority In The Circuit Courts On The Issue Of Whether A Property Owner Must First Seek Compensation Under State Procedures Before Asserting A Taking Claim In The Federal Court Based Upon The Failure Of A Governmental Regulation To Substantially Advance A Legitimate State Interest

As stated above, this Court has never directly addressed the issue of whether a property owner who bases a Taking Claim upon the failure of a governmental regulation to substantially advance a legitimate state interest must first seek compensation through state procedures. This has resulted in a split of authority among the Circuit Courts as to whether such a requirement exists. Although none of the Circuit Courts have directly held that no such requirement exists, like this Court in *Nollan*, they have reached the merits of Taking

Claims based upon the failure of governmental regulations to substantially advance a legitimate state interest, where the plaintiffs had not first exhausted their state remedies.

In *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), the Ninth Circuit reached the merits of a Taking claim substantially similar to those raised in the instant litigation. Commercial developers challenged as a Taking, a city ordinance that conditioned the issuance of nonresidential building permits on the payment of fees to offset burdens allegedly associated with the influx of low-income workers to work on such developments. The developers alleged that the ordinance lacked a substantial relationship to a legitimate governmental interest because there was an insufficient nexus between nonresidential development and the need for low-income housing. While the Ninth Circuit found that the required nexus did in fact exist, and that the ordinance therefore did not result in an unconstitutional Taking, the developers' failure to first seek compensation under state procedures was not discussed and certainly did not serve as an impediment to the Court's reaching the merits of their Taking claim.

The Ninth Circuit also reached the merits of a Taking claim based upon the asserted lack of a sufficient nexus between off-site mitigation measures imposed upon a developer as a condition to proceeding with its development and the interest sought to be advanced by such regulation in *Leroy Land Development v. Tahoe Regional Planning Commission*, 939 F. 2d 696 (9th Cir. 1991). As in *Commercial Builders*, the developer had not sought compensation through state procedures, and this fact was neither addressed nor served as an impediment to the developer's Taking claim in the federal court.

The Fourth Circuit has similarly reached the merits of Taking claims based upon the lack of a substantial relationship between governmental regulation and a

legitimate state interest without first requiring the property owner to seek compensation through state procedures. In *Esposito v. California Coastal Council*, 939 F.2d 165 (4th Cir. 1991), the Fourth Circuit addressed the merits of a Taking claim based upon the asserted failure of the South Carolina Beachfront Management Act, which imposed base and setback lines upon new and restored beachfront development, and the purpose sought to be served by the Act – limiting or eliminating beachfront erosion. While the Fourth Circuit determined that a sufficient nexus existed, and therefore, that no Taking had occurred, the Fourth Circuit reached the merits of the Taking claim, again notwithstanding the fact that the property owners had not first sought compensation through state procedures.

At least one district court within the Eighth Circuit has found a Taking based upon the lack of a substantial relationship between a governmental regulation and a legitimate public interest without first requiring the landowner to seek compensation for such taking through state procedures. In *W.J. (Jack) Jones Insurance Trust v. City of Fort Smith, Arkansas*, 731 F. Supp. 912 (W.D. Ark. 1990), the District Court reached the merits and found that a Taking had occurred, based upon a landowner's claim that the city's denial of a permit to construct a convenience store adjacent to his existing gasoline station, unless it were granted an expanded right-of-way along the property for street purposes, lacked a substantial relationship to a legitimate public purpose. Again, the landowner had not first sought compensation for such Taking through state procedures.

In contrast with the Ninth and Fourth Circuits, and one District Court within the Eighth Circuit, the Third Circuit, in its decision in the instant matter, has come to a contrary conclusion. The Third Circuit affirmed, without opinion, the District Court's *dismissal* of Petitioners' Taking claims based upon the failure of the Challenged Ordinances to substantially advance a legitimate public

purpose because Petitioners had not sought compensation under the Pennsylvania Eminent Domain Code before asserting their claims in the federal court.

Based upon the foregoing, there is a clear split of authority in the lower courts as to whether a Taking claim, based upon the failure of a governmental regulation to substantially advance a legitimate state interest, can be raised in a Federal District Court prior to the plaintiff attempting to obtain compensation under state procedures.[1]

2. THE PETITION SHOULD BE GRANTED TO CLARIFY THE STANDARD FOR DETERMINING WHETHER GOVERNMENTAL ACTION CONSTITUTES A VIOLATION OF SUBSTANTIVE DUE PROCESS

A. Different Standards For Determining Whether Governmental Action Constitutes A Violation Of Substantive Due Process Have Been Applied By The Circuit Courts

This Court, in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) announced the standard to be applied in evaluating whether governmental action constitutes a denial of substantive due process rights guaranteed under the Fourteenth Amendment to the United States Constitution, as follows:

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1. Petitioners believe that the logic of the requirement that a property owner seek compensation through state procedures prior to asserting a claim in a Federal District Court based upon the deprivation of all viable use of land cannot be sensibly applied to Taking claims that challenge the enactment or application of governmental regulations that do not substantially advance a legitimate state interest. It is simply illogical to assume that state procedures designed to provide landowners with compensation for acts of inverse condemnation will provide a mechanism for compensation for the improper exercise of the police power. However, this argument is more properly left for the merits of Petitioners' Appeal.

> The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained.

However, the Circuit Courts have applied this precept of law in various ways, resulting in an extreme divergence of opinion as to the extent to which governmental officials are accountable for their actions. The Seventh and Eighth Circuits have held that substantive due process is violated only if the action complained of is invidious or irrational. *Harding v. County of Door*, 870 F.2d 430 (7th Cir. 1989); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988); *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990). The Sixth Circuit has restricted the level of governmental accountability even further by holding that there can be no violation of substantive due process unless the governmental action shocks the judicial conscience. *G.M. Engineers & Associates, Inc. v. West Bloomfield Twp.*, 922 F.2d 328 (6th Cir. 1990). In the context of the instant litigation, the Third Circuit, by affirming the District Court's pronouncement, has held that government need not even investigate the need for governmental action prior to taking such action, even where such action infringes upon valuable property rights.

The question of the extent to which government should be held accountable for its actions which deprive citizens of the United States of fundamental property rights has never been more important to the American people than it is in these troubled times. The recent cases decided by the Third, Sixth, Seventh and Eighth Circuits have all but obliterated any type of governmental accountability for actions which have a significant impact upon fundamental property rights. Further clarification from this Court is clearly necessary in order to insure that a uniform standard be applied by the lower courts for determining whether governmental action

comports with substantive due process requirements, and to insure that the concept of substantive due process guaranteed under the United States Constitution does not become the name for a principle which exists only in theory, and not in practice.

B. This Court Has Never Directly Addressed The Question Of Whether The Determination Of Whether Governmental Action Is Rational Must Be Based Upon Facts And Circumstances Known To The Governmental Officials At The Time Such Action Was Taken

The question of whether the determination of whether governmental action is rational must be based upon facts and circumstances known to the governmental officials at the time such action was taken has never been addressed by this Court. It is not difficult to understand why – it is conceivable that there has never been another situation such as the instant one where the government failed to make any actual investigation into the need for a particular governmental action prior to taking such action.

There are a myriad of Circuit Court decisions (such as those cited in subsection 1B above) evaluating whether particular governmental actions were rational in light of actual information known to the government at the time that it took such action. However, the Third Circuit appears to be the only Circuit to have held that government need not *be* rational as long as it *could have been* rational and can be retroactively justified. According to the Third Circuit, government need not make *any* investigation into the actual need for a regulatory measure prior to imposing it as long as there *could have been* a rational basis, in its sole subjective opinion, for its imposition.

Without a pronouncement from this Court, it is impossible to determine whether the view adopted by the Third Circuit is proper. However, it is respectfully

suggested that the Third Circuit's view, if accepted, would virtually eliminate any sort of viable substantive due process challenge to governmental action.

CONCLUSION

> Millions of Americans are being priced out of buying or renting the kind of housing they otherwise could afford were it not for a web of governmental regulations. For them, America — the land of opportunity — has become the land of a frustrating and often unrewarded search for an affordable home.
>
> * * * * * *
>
> Communities are increasingly charging large fees to developers who seek the privilege of building housing in them. These fees may bear little resemblance to the actual cost of providing services and facilities that new subdivisions require. Although fee schedules are often driven by fiscal concerns, they have a regressive effect. Fees are generally fixed regardless of how much they affect the cost of a new home. Thus, households that can only afford less expensive houses end up paying a higher proportion of the sales price to cover the cost of fees.
>
> Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing, *"Not in My Backyard" — Removing Barriers to Affordable Housing*, Executive Summary, pp. 3,4.

The imposition of fees as a condition to permitting the construction of housing has a far-reaching impact upon the affordability of those homes to the citizens of the United States. Those fees must necessarily and

regrettably be passed on to the home buyer in order to preserve the economically viability of the building industry. Therefore, the substantive due process rights of all home buyers are at stake in this litigation.

Because of the significant effect upon the affordability of housing, it is of critical importance that development exactions be subjected to scrutiny under uniform and explicit guidelines. Those explicit guidelines can only be issued by this Court. The danger of failing to speak on this issue is evidenced by the wide divergence of standards presently being applied by the lower courts in determining the constitutionality of governmental action. Petitioners respectfully suggest that the time has come for the Supreme Court to speak on these issues and respectfully request that their Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

/s/ Marc B. Kaplin, Esquire

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Dated: February 27, 1992

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1426

HOMEBUILDERS ASSOCIATION OF BUCKS/
MONTGOMERY COUNTIES, INC.,
a Pennsylvania Non Profit Corporation; and
TRAPPE MEADOWS, INC.,
Appellants

v.

BOROUGH OF TRAPPE

BOROUGH OF TRAPPE,
Cross-Claimant

v.

HOMEBUILDERS ASSOCIATION OF BUCKS/
MONTGOMERY COUNTIES, INC.,
a Pennsylvania Non Profit Corporation; and
TRAPPE MEADOWS, INC.,
Cross-Defendants

On Appeal from the United States District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 90-03212)
District Judge: Hon. Raymond J. Broderick

Argued November 18, 1991
Before: MANSMANN, COWEN and ROTH, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. Each party to bear its own costs.

ATTEST: By the Court,

Elizabeth Ferguson
Chief Deputy Clerk

CIRCUIT JUDGE

Dated: November 29, 1991

FILED MAY 3 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOMEBUILDERS ASSOCIATION OF BUCKS/MONTGOMERY COUNTIES, INC. and TRAPPE MEADOWS, INC.	:	CIVIL ACTION
v.	:	
BOROUGH OF TRAPPE	:	NO. 90-3212

MEMORANDUM

BRODERICK, *J.* May 3, 1991

In this litigation, the plaintiffs challenge certain development and building fee ordinances enacted by the Borough of Trappe. The parties have filed cross-motions for summary judgment. For the reasons that follow, the Court will grant the defendant's motion regarding the plaintiffs' federal claims and remand the balance of the action to state court.

I. Background

A. The Ordinances at Issue

The Borough of Trappe is a small, predominantly rural community located in Montgomery County, Pennsylvania. In 1985, it had approximately 1,200 residents. Since then, Trappe's population has almost doubled and is now home to some 2,000 people. A mayor and seven council members serve as the Borough's elected officials. The Trappe government also employs, on a part-time basis, a secretary, treasurer, auditor, building inspector, code enforcement officer, plumbing inspector, fire marshal, civil defense director, and a sewage enforcement officer. Other officials, such as the Borough's

engineer, its solicitor, and its building consultant, work as independent contractors. Trappe has no police force or highway department. Its fire department is a volunteer one, although the Borough does contribute one-third of its nine mill property tax to the department.

The Borough's operating expenses – including those for salaries, trash removal, electric and telephone service for municipal buildings, and office supplies – are paid from the General Fund, which is sustained largely by real estate taxes, property transfer taxes, and various fees paid to obtain permits for the improvement of real property or land development. The Borough transfers some revenues held in the General Fund to a Capital Road Improvement Fund. In addition, Trappe maintains a Highway Aid Fund to finance road repairs. Monies held in the Highway Aid Fund come from liquid fuel taxes collected and distributed to municipal governments by the Commonwealth. The Borough also has a Capital Reserve Fund, which contains monies transferred from the Borough's Water Fund, to pay for improvements to the water system administered by Trappe and its neighboring community, the Borough of Collegeville.

On December 1, 1981, Trappe adopted a Subdivision and Land Development Ordinance. That law sets forth technical prerequisites that landowners must satisfy before initiating subdivision of their property (if intended for residential use) or land development (if intended for commercial use) and establishes a process for the review of proposed projects. Not surprisingly, it requires money to obtain the Borough's approval of a subdivision or development plan. A landowner must tender a preliminary subdivision application fee and a final subdivision application fee. He or she must pay for all services performed by the Borough Engineer and the Borough Solicitor in evaluating the plan. The developer of a residential project must design and construct, at its own expense, sewer collection and water distribution systems for the homes to be built in the subdivision.

Often, as a condition to approval, the developer must construct at its own expense off-property improvements – such as the widening of public roads or the installation of traffic signals – that the Borough deems necessary due to the subdivision's partial anticipated effect on the existing municipal infrastructure.

In addition to the foregoing costs, a developer is required to pay fees under four other ordinances, each of which is challenged in this action. First, pursuant to the Municipal Facilities and Services Fund Improvement Ordinance, which is known as the Impact Fee Ordinance, the Borough charges $1,000 for each building permit for each residential dwelling unit to be erected in an approved subdivision. Borough of Trappe, Pa., Ordinance 253 (Aug. 2, 1988). The Borough articulated the reasoning behind its adoption of the ordinance in the law itself:

> Section 2. *Findings*
> Borough Council of the Borough of Trappe
> hereby finds:
>
> (a) The Borough Council of the Borough of Trappe is required by statute to keep all roads, bridges, parks and municipal services and facilities, including roads, bridges, parks, traffic signals, curbs, sidewalks, the municipal building, and various and divers municipal services effectively available, well-maintained in good repair to provide for the public health, welfare and safety.
>
> (b) The Borough of Trappe has previously not experienced sufficient land development to impact adversely on the costs of required municipal facilities and services, and tax revenue and user charges have, in general, been, in the past, sufficient to enable payment of the costs of municipal facilities and services required to accommodate public demand.

(c) The residents, taxpayers and users of municipal facilities and services in the Borough of Trappe have, in the past, contributed significant funds in the form of taxes towards the costs of existing municipal facilities and services, which represent a substantial and incalculable investment in existing municipal facilities and services.

(d) The Borough of Trappe is experiencing increased demand for development of land within the municipality, causing an adverse strain and impact on tax revenues at existing levels, and impairing the ability of taxpayers, residents and users to bear the costs of increased demand for municipal facilities and services.

(e) Equitable considerations as well as the consideration of fair share require that future residents and users of existing municipal facilities and services contribute towards the investment already made in those facilities and services.

(f) The level of existing municipal facilities and services is adequate to meet the present needs of the residents and users of municipal facilities and services in the Borough of Trappe, but additional facilities and services caused by future development required, mandated and caused by the future development of property within the municipality, equitable considerations require that future residents and users of municipal facilities and services in the Borough of Trappe bear their fair share of the increased costs of additional municipal facilities and services caused by future development.

(g) Future development of land in the Borough will impose substantial costs upon the Borough in that, among other things:

(1) future development will result in a growth in the burdens on the Borough's municipal facilities and services infrastructure,

(2) because of such growth, the assessability and capability of the existing public streets, municipal facilities and services, and related works will require substantial improvement and support, which improvement and support are necessary to the public's health, safety, and welfare, and

(3) the consequence of future development will necessitate and require extensive, costly changes, modifications and additional municipal facilities and services, including making necessary construction, repairs and maintenance of extensive and costly additions to the municipal road system and providing additional police protection by a municipal police force; and

(4) it is therefore necessary and proper that provisions be made for the capital fund to meet the required additional demands on municipal facilities and services arising from new development so that the municipality can provide the proper and adequate municipal facilities and services arising therefrom.

Id. As stated in section 6, monies received under the Impact Fee Ordinance are deposited into the Municipal Facilities and Services Fund and are to be "expended solely for payment of the costs of municipal facilities and services." According to section 3, "municipal facilities" are capital equipment and facilities needed to deliver municipal services, including roads and bridges and the improvements made to them, traffic signals, sidewalks, curbs, police and ambulance vehicles, municipal buildings, office equipment, parks, and storm water drainage systems. "Municipal services" comprise those delivered by administrative, police, and firefighting personnel, as

well as highway maintenance, street lighting, and ambulance and fire hydrant services.

Second, to obtain a building permit under Trappe's Building Code, a developer must contribute a fee equal to one percent of the construction value of the residential unit described in the permit or fifteen dollars, whichever is greater. Borough of Trappe, Pa., Ordinance 240 §2(11) (July 7, 1987). Income from this source is deposited into the Borough's General Fund, which, as explained earlier, is used to pay salaries and to maintain municipal buildings.

The third municipal law at issue is the Capital Contribution Ordinance. Borough of Trappe, Pa., Ordinance 245 (Sept. 1, 1987), *as amended,* Ordinance 248 (Dec. 21, 1987). Since the 1930s, Trappe and Collegeville have operated a Joint Water System to extract and distribute ground water throughout the two boroughs. Section 1 of the Capital Contribution Ordinance mandates that one desiring to connect a residential structure to the Joint Water System must pay, at the time a building permit is sought, a Capital Contribution Fee of $1500 per home or equivalent dwelling unit (EDU). These fees are deposited into the Borough's Water System Account. Section 2 of the Capital Contribution Ordinance imposes a $700 tapping fee for the connection of a residence to the public water system.

Last, the plaintiffs challenge the Well-Site Ordinance. Borough of Trappe, Pa., Ordinance 219-B (Dec. 1, 1987) (amending section 222 of the Subdivision and Land Development Ordinance of 1981). Briefly stated, it requires any one who tenders a subdivision plan for thirty or more homes to dedicate to the Borough land suitable for constructing a well site in order to serve that subdivision with municipal water. If no satisfactory well site can be located, the developer must make a capital contribution equal to the fair market value of the cost of a well site. The ordinance provides in part:

Where any plan is submitted that encompasses land that would allow for the development of any use, present or in the future, under the applicable Trappe Borough Zoning Ordinance, and/or Trappe Borough Subdivision and Land Development Ordinance, whether or not so provided or proposed in the plan submitted, for at least thirty (30) residential dwellings . . . the developer shall provide for adequate land to be dedicated to the Borough of Trappe suitable for the development and use of the municipal water well to be operated by the Collegeville-Trappe Joint Water Authority, as a public improvement, *for the purpose of serving the development, presently or in the future, with municipal water.* The aforesaid land to be so dedicated to the Borough of Trappe shall first be tested by a test well by the developer, at the developer's cost and expense, to assure that:

(1) the well site would provide a minimum of one hundred (100) gallons per minute;

(2) will conform to the regulations of the Pennsylvania Department of Environmental Resources and the Delaware River Valley Basin Authority and be acceptable for the appropriate operational permit from said agencies;

(3) will meet the specifications of the Collegeville-Trappe Joint Water System as approved by their engineer;

(4) . . . the proposed well site will have adequate ingress and egress for the construction and development of the well, as well as the future use and maintenance thereof, including the necessary easement for ingress and egress on the public road to the well site for the construction, use and maintenance thereof as well as for the laying of the necessary pipe to interconnect with the municipal water system; and (15) . . . the proposed site shall meet the

specifications, regulations, and applicable rules and ordinances of and concerning the Collegeville-Trappe Joint Water System.

* * * *

Each site shall be dedicated to the Borough of Trappe, by fee simple deed, unencumbered by any lien, easement, or restriction, at the time of subdivision approval and shall provide for the appropriate ingress and egress to the public road for the construction, use and maintenance of any well thereon as well as the appropriate easement and right of way for piping, as well as the construction, maintenance and use of the appropriate pipe and appurtenances to interconnect the well with the Collegeville-Trappe Joint Water System.

Where, in the opinion of the engineer for the Collegeville-Trappe Joint Water System, adequate land and a test well cannot be provided to meet the standards and conditions aforesaid on the land to be so subdivided or developed, then the developer shall make a capital contribution equal to the fair market value of the cost of a well site that could then and there be developed in the Borough of Trappe for municipal water supply use by the Collegeville-Trappe Joint Water System and the cost of a test well. If the developer and the Borough of Trappe disagree as to the equivalent capital contribution aforesaid, in lieu of dedicating land, and the costs of establishing a test well, then each party shall select a licensed real estate broker, who, in turn, shall select a licensed real estate broker, and the majority of the three (3) licensed real estate brokers shall establish the fair capital contribution for the public improvement aforesaid. The decision of the majority of the three (3) licensed real estate brokers shall be conclusive and binding upon the parties. Each party shall bear the cost and expense of paying their licensed real estate broker, and shall share equally

in the costs and expenses of the third licensed real estate broker.

Borough of Trappe, Pa., Ordinance 219-B §1 (Dec, 1, 1987) (emphasis added).

B. The Trappe Meadows Subdivision

Before or during 1987, L & W Associates purchased seventy-one lots covering 71.86 acres of real property located in the Borough of Trappe. Pursuant to an agreement of sale dated November 13, 1987, L & W assigned its rights to the tract to Louis Besa. At about the same time, Besa then transferred his interest in the land to a partnership named Trappe Meadows Associates. In March of 1989 and under a written agreement, Trappe Meadows Associates sold the property to plaintiff Trappe Meadows, Inc. (hereinafter, Trappe Meadows) for $ 3.2 million, or $45,000 per lot. Besa currently serves as the president of the corporation.

The history of the development of this tract is as follows. In October 1987, L & W Associates initially presented a proposed subdivision project to the Borough of Trappe Planning Commission. On May 17, 1988, L & W submitted a sketch of the plan for review by the Planning Commission. During that meeting, Councilmember Al Douglas summarized the results of an engineering firm's "rather exhaustive study" of the Joint Water System's records dating from the early 1970s through 1988. Trans., May 17, 1988, at 23 (Def. Motion for Summ. Judg., Ex. D). The report showed that there were five potential well sites within Trappe and Collegeville. It also indicated that the Boroughs' capacity to withdraw water from existing facilities was 1.1 million gallons a day, some five percent of which is lost due to leakage. Over the seven week period before the meeting, however, Trappe and Collegeville had used, on average, some 750,000 gallons each day, even without a major fire. From this the Councilmember concluded, "With the expected growth that we see in Collegeville and

Trappe, I am not in a position to say that we're going to shut everybody off, but, boy, we're running scared as hell right now. We do not see, very frankly, that much water, and leaving us a safety margin for drought and for an emergency such as a fire." *Id.* at 24. At a subsequent public hearing held to consider L & W's preliminary plan, the applicant's representative acknowledged that an engineering concern had concluded the tract contained no appropriate well sites for dedication under Trappe's Well-Site Ordinance. Trans., July 19, 1988, at 10 (Def. Motion for Summ. Judg., Ex. E).

Other problems with the suggested project arose. A portion of the tract rested in a potential flood plain, several lots appeared to have a soil type that precluded development, and issues were raised about storm water drainage. The developer sought a special exception and variance to allow the construction of a sanitary sewer line within the designated flood plain area. The Zoning Hearing Board, based in part on the Borough Engineer's recommendation, granted the application for a special exception on October 25, 1988.

The Planning Commission then gave its preliminary approval to the subdivision plan, but noted that the matter of capital contribution for a well site had not been resolved. A real estate broker retained by Besa determined that the fair market value of the cost of a well site was $7,500. On February 7, 1989, Marc Kaplin, an attorney who represents the plaintiffs in this lawsuit, appeared before the Borough Council on behalf of the developer. Besa also was present at the meeting. The Council declined to accept the broker's figure because it was predicated on an evaluation, not an appraisal. Kaplin explicitly accepted that conclusion. Trans., Feb. 7, 1989, at 11 (Def. Motion for Summ. Judg., Ex. I). Later, regarding the capital contribution for the well site, Councilmember Douglas stated to Kaplin, "[L]et's each of us go ahead and go through the appraisal process per the ordinance on the well site." Kaplin responded by proposing various methods – including negotiation –

outside the procedure delineated in the Well-Site Ordinance to resolve the capital contribution question.

> MR. KAPLAN [sic]: Our only concern was that we're going to eat up more money in appraisals than is really worth it. If you would like to sit down and talk about a number – if you would like to tell us what you think the number is, I would rather do that. You've got to spend money for an appraiser; we have to spend money.
>
> MR. DOUGLAS: I realize that.
>
> MR. KAPLAN: I mean, how far apart are we?
>
> MR. DOUGLAS: I don't have any idea. I don't know where it's going to come down. But bear in mind this is our first shot at this. Whatever we do on this tends to establish a precedent for future actions. Out of fairness to developers we shouldn't be high, and out of fairness to the citizens of Trappe we shouldn't be low.
>
> MR. KAPLAN: Should we do it with this three appraiser business, or should we attempt to agree on one appraiser, and we'll split the cost of it?
>
> MR. SAGER: [We'll] get back to you.
>
> MR. KAPLAN: I mean, how many appraisers do we need for a quarter acre site? Maybe we can agree on one guy without anybody being bound by it. If he comes in with a number that we're all satisfied with, that will be the end of it.

Id. at 25-26.

Of course, that was not the end of it. On June 27, 1989, Besa and Douglas met at Harpoon Louie's, a restaurant in Collegeville, to discuss the well-site issue. Douglas previously had determined that the well site was worth $35,000. Dep. of A.N. Douglas, Aug. 9, 1990, at 135 (Def. Motion for Summ. Judg., Ex. J). At the restaurant, he told Besa that if Trappe Meadows did not

make a $25,000 capital contribution for the well site, the Borough would not approve the subdivision. Besa offered to settle for $15,000. According to Besa's affidavit, Douglas remarked during the meeting that the Councilmembers "didn't care if another home is built in the Borough" and that Douglas's "job was to get as much money as possible," Affidavit of L. Besa, Dec. 16, 1990, at ¶ 26 (Pl. Motion for Summ. Judg., Ex. E). Besa eventually capitulated to the $25,000 demand, he states, only because denial of plan approval at that time would have been a "financial disaster causing loss of the property." Under an unspecified agreement, "Trappe Meadows was required to go to closing by October 17, 1989 or lose its opportunity to develop the property. Hence Trappe Meadows had only a few months to obtain approval and financing to satisfy any conditions to approval and conclude settlement." *Id.* at ¶ 27.

A public meeting was then held before the Council. Besa and his counsel attended. After it was announced that Trappe Meadows would make a $25,000 capital contribution for the well site, the Council gave its final approval to the subdivision plan. Trappe Meadows and the Borough executed an agreement, dated November 7, 1989, which provided in part that the developer would tender the $25,000 sum in satisfaction of its obligations under the Well-Site Ordinance.

As of December 1990, Trappe Meadows has constructed four homes on the tract. It has paid to the Borough $4,200 per unit under the contested fee ordinances for a total of $16,800, exclusive of the well-site capital contribution. Besa anticipates and is now building on the property three different styles of homes that will carry a price tag of between $259,900 and $279,900 each. Trappe Meadows, in consequence, will secure some $19 million in total gross revenues upon sale of the 71 new residences.

II. Discussion

A. Standing of the Homebuilders Association

The Court first must decide whether the Homebuilders Association has standing to maintain this action. Article III of the Constitution requires that one who seeks to invoke federal jurisdiction must show the existence of a case or controversy. *Lewis v. Continental Bank Corp.*, __ U.S. __, __, 110 S. Ct. 1249, 1253, 108 L. Ed. 2d 400 (1990); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 96 S. Ct. 1917, 1924, 48 L. Ed. 2d 450 (1976); *Flast v. Cohen*, 392 U.S. 83, 94-101, 88 S. Ct. 1942, 1949-53, 20 L. Ed. 2d 947 (1968); *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962). To do so, a plaintiff must demonstrate that he or she "has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983) (quotation marks omitted). *Accord United States v. Sciarra*, 851 F.2d 621, 634 (3d Cir. 1988). Threatened future harm, if posited as a litigant's authority for standing to sue for prospective relief, must be " 'certainly impending' " to satisfy the requirements of article III. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308-09, 60 L. Ed. 2d 895 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S. Ct. 658, 663-64, 67 L. Ed. 1117 (1923)). *Accord Whitmore v. Arkansas*, __ U.S. __, __, 110 S. Ct. 1717, 1725, 109 L. Ed. 2d 135 (1990); *Lyons*, 461 U.S. at 102, 103 S. Ct. at 1665; *Brown v. Fauver*, 819 F.2d 395, 400 (3d Cir. 1987).

Homebuilders does not assert that it, as an entity separate from its individual members, has suffered any injury at the hands of the Borough. It has not paid monies to Trappe, had its property rights arguably impaired, or otherwise been subjected to the pertinent

ordinances. Nor does it claim that any of these are likely to transpire. As such, Homebuilders does not have – and does not contend that it has – standing in its own right to seek judicial relief.

That does not end the matter, however, because even in the absence of harm to itself, "an association may have standing solely as the representative of its members" if it can demonstrate "that its members, or any one of them," have sustained or "are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin,* 422 U.S. 490, 511, 95 S. Ct. 2197, 2211-22, 45 L. Ed. 2d 343 (1975). There is no doubt that Homebuilders adequately states in the complaint facts tending to show that its members have suffered cognizable harm sufficient to invoke the Court's jurisdiction. It alleges, and merely repeats in its summary judgment memorandum, that its members have paid out fees under the ordinances at issue, are currently doing so, and will continue to do so in order to develop property within the Borough. The difficulty is that this case is now at the summary judgment stage, and Homebuilders has presented no evidence whatsoever to support that claim. It simply rests on allegations contained in the complaint, which is insufficient to avoid the entry of summary judgment against it. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986) ("Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admission on file,' designate 'specific facts showing that there is a genuine issue for trial.' "). Because Homebuilders has not proffered even "one sworn averment" that any one of its members has been or will be injured by the putatively illegal ordinances, a fact necessary to sustain its assertion of associational standing, judgment must be entered against it under

Rule 56. *Lujan v. National Wildlife Federation*, __ U.S. __, __, 110 S. Ct. 3177, 3188-89, 111 L. Ed. 2d 695 (1990).

B. Trappe Meadows' Federal Claims

In its complaint, Trappe Meadows alleges that the Impact Fee Ordinance violates the equal protection clause of the fourteenth amendment (Count IV) and the takings clause of the fifth amendment (Count V), and impairs its substantive due process rights (Count VI). The Building Permit Fee exacted under Ordinance 240 is said to run afoul with the takings clause (Count IX) and substantive due process (Count X). Both section 1 and section 2 of the Capital Contribution Ordinance assertedly contravene the takings clause (Count XII) and the dictates of substantive due process (Count XIII). The Well-Site Ordinance is supposedly illegal under the takings clause (Count XIV), and the manner in which the Borough extracted the capital contribution for the well-site is claimed to constitute procedural (Count XVI) and substantive due process violations (Count XVII).

Before proceeding to the substance of Trappe Meadows' federal claims, the Court notes two interrelated matters. First, the plaintiff, although invoking several clauses of the federal Constitution, makes little discernible effort to distinguish between them. Rather, the plaintiff appears to proceed in large part on the assumption that there is some generic federal right created by 42 U.S.C. section 1983 which divests municipal governments from burdening "the right to build on one's property." *See. e.g.*, Pl. Mem. Summ. Judg. at 35-36, 51; Pl. Reply Mem. at 11. That is, of course, twice wrong. Section 1983 "is not itself a source of substantive rights," but only a mechanism "for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, __, 109 S. Ct. 1865, 1870, 104 L. Ed. 2d 443 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S. Ct 2689, 2694 n.3, 61 L. Ed. 2d 433 (1979)).

"Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance." *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 84, 100 S. Ct. 2035, 2042, 64 L. Ed. 2d 741 (1980); *see id.* at 92-94, 100 S. Ct. at. 2046-47 (Marshall, J., concurring); *Munn v. Illinois,* 94 U.S. 113, 134, 24 L. Ed. 77 (1877); *Matter of Roberts,* 682 F.2d 105, 107 (3d Cir. 1982); *cf. Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1012, 104 S. Ct. 2862, 2877-78, 81 L. Ed. 2d 815 (1984); *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972); *Correa-Martinez v. Arrillaga-Belendez,* 903 F.2d 49, 53 (1st Cir. 1990).

Second, the plaintiff's motion for summary judgment is replete with patently irrelevant and spurious arguments, such as Trappe Meadow's extended reliance on *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943), a first amendment case that has no conceivable application here. Another example is the plaintiff's procedural due process claim. Not only has Trappe Meadows failed to identify any federal right implicated by the departure from the local Well-Site Ordinance, *Carson v. Block,* 790 F.2d 562, 565 (7th Cir.), *cert. denied,* 479 U.S. 1017, 107 S. Ct. 669, 93 L. Ed. 2d 721 (1986); *Cohen v. City of Philadelphia,* 736 F.2d 81, 86 (3d Cir.), *cert. denied,* 469 U.S. 1019; 105 S. Ct. 434, 83 L. Ed. 2d 360 (1984), but Kaplin, on behalf and in the presence of his client's president, tendered an unequivocal and on-the-record waiver of whatever protections the Ordinance's appraisal procedure bestowed upon Trappe Meadows, *See, e. g., Erie Telecommunications, Inc. v. City of Erie,* 853 F.2d 1084, 1094-96 (3d Cir. 1988); *Washington v. Secretary of Health & Human Serv.,* 718 F.2d 608, 610 (3d Cir. 1983). For him now to complain that the municipality illegally circumvented the procedure is disingenuous, Accordingly, although

the Court has considered, and rejects, all the contentions raised by the plaintiff, many of them do not merit any discussion.

Turning to Trappe Meadows' assertions that the Borough has taken its property, the Court easily concludes that these claims are not ripe for adjudication. The fifth amendment, applicable to the States through the fourteenth, provides that "private property [shall not] be taken for public use, without just compensation." The clause does not forbid government acquisition of property for public use. Rather, it only "proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194, 105 S. Ct. 3108, 3120, 87 L. Ed. 2d 126 (1985). In consequence, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195, 105 S. Ct. at 3121. *Accord First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 314, 107 S. Ct. 2378, 2385, 96 L. Ed. 2d 250 (1987); *Ruckelshaus v. Monsanto Co.,* 467 U.S, at 1013, 1018 n.21, 104 S. Ct, at 2878, 2881 n.21; *Peduto v. City of North Wildwood,* 878 F.2d 725, 727 n.1 (3d Cir. 1989).

Pennsylvania has devised a mechanism under which Trappe Meadows' taking claims may be resolved. As enunciated by the Commonwealth's Eminent Domain Code, to "condemn" means "to take, injure or destroy private property by authority of law for a public purpose." 26 Pa. Cons. Stat, Ann. §1-201(1). Section 1-201(2) defines a "condemnee" as "the owner of a property interest taken, injured or destroyed, but does not include a mortgagee, judgment creditor or other lienholder." Under Section 1-601, a "condemnee shall be entitled to just compensation for the taking, injury, or destruction of his property, determined as set forth in this article." If, as the plaintiff contends, the Borough has taken its property, it may seek relief under Section

1-502(e), which states: "If there has been a compensable injury suffered and no declaration of taking thereof has been filed, a condemnee may file a petition for the appointment of viewers substantially in the form provided for in subsection (a) of this section, setting forth such injury."

Trappe Meadows does not deny that it has not availed itself of this remedy. Instead, apparently suggesting that the statutory scheme is deficient, it asserts that the Eminent Domain Code "plainly applies only to the procedure for obtaining just compensation for the condemnation of real property." Pl. Mem. Summ. Judg. at 52. The plaintiff cites no authority for the counterintuitive proposition that the reach of the Eminent Domain Code is so limited, and the express language of the Code itself, which encompasses "private property," is to the contrary. 26 Pa. Cons. Stat. Ann. §1-201(1) (referring to "private property"); *id.* §1-201(2) (referring to condemnee's "property interest"); *id.* §1-601 (stating just compensation due for the taking, injury, or destruction of "property"); *see, e.g., Schertel v. Rex,* Civ. No. 89-7997, slip op. (E.D. Pa. Mar. 6, 1991) (holding that Pennsylvania's Eminent Domain Code provides "complete and adequate remedy" to redress claimed taking of fence by municipality); *K.P.M. Corp. v, Department of Hous. & Urban Dev.,* Civ. No. 86-4089, slip. op. (E.D. Pa. Nov. 23, 1987). Further, even if the developer's argument were correct, it conveniently ignores the fact that the required dedication of land under the challenged Well-Site Ordinance involves precisely that, real property. Unless and until Trappe Meadows applies for and is denied just compensation for the alleged taking of its property, no constitutional violation has been stated under Counts V, IX, XII, and XIV.

Next, Trappe Meadows complains that the Impact Fee Ordinance violates the equal protection clause of the fourteenth amendment. Economic legislation which neither classifies on the basis of a suspect criterion nor

implicates fundamental freedoms is entitled to an "extraordinary" judicial solicitude that approaches "the equivalent of a strong presumption of constitutionality." *Rogin v. Bensalem Township,* 616 F.2d 680, 687 n.30 (3d Cir.) (quoting *Dieffenbach v. Attorney General of Vermont,* 604 F.2d 187, 195 (2d Cir. 1979)), *cert. denied,* 450 U.S. 1029, 101 S. Ct. 1737, 68 L. Ed. 2d 223 (1980). *Accord Hodel v. Indiana,* 452 U.S. 314, 331-32, 101 S. Ct. 2376, 2387, 69 L. Ed. 2d 40 (1981). Such forms of regulation will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the reviewing court] can only conclude that the legislature's actions were irrational." *Vance v. Bradley,* 440 U.S. 93, 97, 99 S. Ct. 939, 943, 59 L. Ed. 2d 171 (1979). *Accord City of Dallas v. Stanglin,* 490 U.S. 19, __, 109 S. Ct. 1591, 1594, 104 L. Ed. 2d 18 (1989); *Kadrmas v. Dickinson Public Schools,* 478 U.S. 450, __, 108 S. Ct. 2481, 2487, 101 L. Ed. 2d 399 (1988) (stating socioeconomic legislation "will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose."); *United States v. Frame,* 885 F.2d 1119, 1137 (3d Cir. 1989), *cert. denied,* __ U.S. __, 110 S. Ct. 1168, 107 L. Ed. 2d 1070 (1990); *Price v. Cohen,* 715 F.2d 87, 91 (3d Cir. 1983), *cert. denied,* 465 U.S. 1032, 104 S. Ct. 1300, 79 L. Ed. 2d 700 (1984).

The plaintiff also claims that the Impact Fee Ordinance, the Building Permit Fee exacted under Ordinance 240, the Capital Contribution Ordinance, and the Well-Site Ordinance impair substantive due process rights secured by the federal Constitution. As the Third Circuit has stated:

> The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest. "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is

> enough if there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

Rogin, 616 F.2d at 689 (quoting *Williamson v. Lee Optical Co.,* 348 U.S. 483, 487-88, 75 S. Ct. 461, 464, 99 L. Ed. 2d 563 (1955)). *Accord Pace Resources, Inc. v. Shrewsbury Township,* 808 F.2d 1023, 1034-35 (3d Cir.), *cert. denied,* 482 U.S. 906, 107 S. Ct. 2482, 96 L. Ed. 2d 375 (1987).* Although equal protection and substantive due process analyses embrace "virtually the same standard of review" in the context of economic legislation, they do differ in focus. *Rogin,* 616 F.2d at 689. While the inquiry under the equal protection clause is whether the Borough has irrationally distinguished between similarly situated classes, the question under substantive due process is whether it was irrational for the Borough to have passed the law at all and to have applied it to Trappe Meadows. *Id.*

Trappe Meadows basically launches the same series of accusations against each of the legislative enactments at issue: That they benefit the general public, rather than offset the impact of new development; that the need for improvements does not stem from new development, but from the Borough's growth in population and from existing inadequacies in the municipal infrastructure; and that the Borough never performed any "comprehensive" studies to justify the enactment of the Ordinances or the amount of fees selected, or otherwise determined what "specific" improvements are needed or how much they will cost. Complaint ¶¶ 38, 50, 56-57; Pl. Mem. Summ. Judg. at 38-39, 40-41, 53-55; Pl. Reply Mem. at 6. None of these contentions contains the

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* In this Circuit, a governmental action shown to be "tainted by improper motive," such as personal animus, also may transgress substantive due process. *Bello v. Walker,* 840 P.2d 1124, 1129 (3d Cir.), *cert. denied,* 488 U.S. 851, 109 S. Ct. 134, 102 L. Ed. 2d 107 (1988). The plaintiff does not assert (or show) that this type of violation transpired. Pl. Mem. Summ. Judg. at 32-34

slightest degree of merit. Initially, the Court notes that modern constitutional jurisprudence does not compel legislative bodies to marshall any sort of proof – let alone the type which the plaintiff might deem satisfactory – before or after promulgating ordinances affecting business interests. The very nature of our democratic system entrusts to elected officials judgments about how much and what kind of information is enough to warrant legislative action in that area. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom" of socioeconomic regulations "are not to be carried out in the federal courts." *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229, 242-43, 104 S. Ct. 2321, 2330, 81 L. Ed. 2d 186 (1984). *Accord Vance,* 440 U.S. at 111, 99 S. Ct. at 949-50; *United States v. Carolene Products,* 304 U.S. 144, 154, 58 S. Ct. 778, 784, 82 L. Ed. 1234 (1938); *Swin Resource Sys., Inc. v. Lycoming County,* 883 F.2d 245, 255 (3d Cir. 1989) (equal protection clause satisfied "as long as the legislature 'rationally could have believed' that the statutory classification would promote a legitimate objective. Whether the statutory classification is 'in fact' successful in accomplishing that objective is irrelevant." (quoting *Western & Southern Life Insurance Co.,* 451 U.S. 648, 672, 101 S. Ct, 2070, 2085, 68 L. Ed. 2d 514 (1981)), *cert. denied,* __ U.S. __, 110 S. Ct. 1127, 107 L. Ed. 2d 1033 (1990); *Shelton v. City of College Station,* 780 F.2d 475, 479 (5th Cir.), *cert. denied,* 477 U.S. 905, 106 S. Ct. 3276, 91 L. Ed. 2d 566 (1986). This elementary precept alone disposes of a great bulk of the plaintiff's case against the Borough.

At any rate, the undisputed record submitted in this case goes far beyond that which the federal Constitution requires to sustain each of the relevant ordinances. The one-percent building permit fee established under Ordinance 240 does not violate substantive due process. Recouping expenses occasioned by the administration of a regulatory scheme calculated to protect the safety of

homebuyers from those who directly benefit from it or those who receive the governmental service is neither irrational nor illegitimate. As the uncontroverted evidence discloses, implementation and enforcement of the Building Code entails various costs. Trappe employs a Building Inspector, who is charged with ensuring Code compliance. Until 1988, the Inspector received one-half of the building permit fees collected, up to a maximum of $30,000 per year. Since that time the Borough has paid the Inspector a flat salary of $10,400 annually. The Inspector typically visits a new home eight to ten times, with each inspection lasting half an hour to an hour. He consults with the Borough Solicitor and the Borough Engineer (both of whom are paid on a fee-for-service basis) and occasionally retains an outside architectural firm to aid in the resolution of questions arising under the Code. Trappe's Secretary and its Treasurer also shoulder responsibilities related to day-to-day application of the Building Code. Indeed, by the Treasurer's analysis, actual expenses incurred by the Borough's administration of its building permit regime have outstripped revenues generated under it by $7,074 during the first ten months of 1990. Affidavit of J. Klink, Dec. 27, 1990 (Def. Motion for Summ. Judg., Ex. A).

Section 1 of the Capital Contribution Ordinance and the Well-Site Ordinance also are constitutional. They are designed to facilitate the provision of adequate water services and supplies to new residents. This is an indisputably legitimate, even compelling, interest. As Trappe Meadows itself readily acknowledges, the Joint Water System is a troubled one. It has functioned on a marginal yield since the mid-1980s, partly because the water supply is tainted with TCE. By installing air strippers to rectify the chemical contamination, System officials have been able to use formerly disabled wells and meet present requirements.

There exists no excess capacity, however, to satisfy even the anticipated demand created by the one hundred homes now being built. Dep. of S. Siegfried, Nov.

14, 1990, at 57-58 (Def. Motion for Summ. Judg., Ex. M). As the Superintendent of the System has testified, "It's very apparent that there is a need for additional water in the system and for additional water sources in the system. . . . [It has] had a large problem keeping up with the demand during drought conditions." *Id.* at 36. So acute is this difficulty that "[a]dditional homes on the system under drought conditions would definitely add a substantial strain to the system, to the point that [it] probably would not be able to provide service." *Id.; see also supra* at 10. The Superintendent estimates that three new wells are needed to meet the demand created by development. One well, which requires between $180,000 and $250,000 to construct, can serve approximately 200 residences. That outlay is exclusive of water quality maintenance costs. An air stripper runs some $100,000.

In consequence, section 1 of the Capital Contribution Ordinance and the Well-Site Ordinance are more than rationally related to the municipality's interest in furnishing new residents with water. Trappe officials reasonably may have concluded that existing water supplies could not meet the demand created by subdivisions containing 30 or more homes. Requiring the dedication of land or the provision of a monetary contribution allows the Borough to secure land for a well site, an obvious predicate to extracting ground water. The capital contributions derived from connecting 200 homes to the Joint Water System ($300,000, at $1,500 per residence) approximates the actual cost of constructing on the property a well needed to supply that number of residences with water.

Section 2 of the Capital Contribution Ordinance meets constitutional strictures. The ordinance itself states that the fee is "for services for opening the street, tapping the main, supplying services to the pipeline, supplying a corporation cock, curb stop, curb box, meter and meter coupling." The President of Trappe Meadows complains that each of these "*facilities was constructed*

by Trappe Meadows at its sole and exclusive expense and at the projected cost to it of approximately $32,000." Affidavit of L. Besa, Dec. 10, 1990, at ¶ 18 (Pl. Motion for Summ. Judg., Ex. E) (emphasis added). The undisputed evidence also demonstrates, however, that the Borough provides *services* related to tapping. Because Trappe bears the risk of structural defects, it reviews and designs the system to be constructed by the developer. Joint Water System officials provide instructions regarding emplacement of the system and hydrants and how to thrust block the system. They install the meters and the outside remote meter readers. They inspect the installation of all facilities. Dep. of S. Siegfried, Nov. 14, 1990, at 51, 114, 116, 118-19 (Def. Motion for Summ. Judg., Ex. M). The Borough's interest in receiving reimbursement for these services is rationally furthered by exacting the fee.

Last, the Impact Fee Ordinance comports with the principles of both substantive due process and equal protection. The concept of "general welfare" is a broad and flexible one, *Village of Belle Terre v. Borras,* 416 U.S. 1, 3-6, 94 S. Ct. 1536, 1538-39, 39 L. Ed. 2d 797 (1974); *Berman v. Parker,* 348 U.S. 26, 32-33, 75 S. Ct. 98, 102, 99 L. Ed. 27 (1954), and the purposes recited by the Ordinance itself fall well within the ambit of permissible governmental objectives. *See supra* at 4-5. The Borough reasonably may have concluded that additional development will necessitate the construction of new roads and that greater traffic will increase the maintenance costs for existing public streets and bridges outside the immediate area of any residential subdivision. The uncontradicted evidence here demonstrates that at least one highway will need to be improved at substantial expense in order to handle the influx of residents. Trappe officials rationally may have anticipated that the rapid growth it is experiencing will strain available fire and ambulance services and will require it to hire and train a police force and purchase support facilities. Additionally, the Borough Council may have

discerned that increasing construction costs would help preserve Trappe's small-town or rural attributes and maintain a particular quality of life by curbing the pace of development. *See Belle Terre,* 416 U.S. at 5-6, 94 S. Ct. at 1539; *id,* at 13-14, 94 S. Ct. at 1543 (Marshall, J., dissenting); *Berman v. Parker,* 348 U.S. at 32-33, 75 S. Ct. at 102; *Construction Industry Assoc. v. City of Petaluma,* 522 F.2d 897, 906-09 (9th Cir. 1975), *cert. denied,* 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976); *Ybarra v. Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974).

Nor has the plaintiff discharged its "heavy burden" of demonstrating that the classification contained within the Impact Fee Ordinance is both irrational and arbitrary. *Kadrmas,* 487 U.S. at __, 108 S. Ct. at 2490. The defendant may have thought that new residents were more likely to work outside the community and therefore would use highways leading in and out of the Borough much more frequently than longtime residents. Also, Trappe chose to visit the charge upon precisely those who, such as Trappe Meadows, facilitate and profit from the Borough's growth. Unlike the Borough, developers can pass additional infrastructure and service costs directly onto the new residents whose presence necessitates the new capital investment. Because the capital expenditures required to upgrade municipal facilities and services outside a given subdivision are often incurred well before the homes in the subdivision are occupied, extracting the Impact Fee legitimately shifts from the Borough (and onto developers) the risk that its monies will have been wasted on unneeded public improvements if the new residences do not sell.

The plaintiff's complaint that municipal facilities are already deficient is unpersuasive, First, it is unproven. The only evidence proffered by Trappe Meadows to support the claim is taken out of context. Rather, the affidavits, depositions, and the Borough's findings enunciated in the Impact Fee Ordinance (many of which are quoted above) all indicate that governmental services

and facilities are adequate to meet current demands, but that they likely cannot satisfy new needs stemming from growth. Second, even if true, the argument is of no constitutional significance. The challenged classification need only bear a rational relationship to a legitimate governmental purpose. That the Borough may have assigned burdens imperfectly does not yield the conclusion that it has acted arbitrarily. *Dandridge v. Williams*, 397 U.S. 471, 485-86, 90 S. Ct. 1153, 1161-62, 25 L. Ed. 2d 491 (1970). Moreover, Trappe Meadows' contention is largely an attack on the "empirical wisdom" of the ordinances, an argument which should be addressed to the Borough Council, not this Court.

In sum, it is not irrational or arbitrary for a municipality, expecting growth, to impose certain fees upon developers so that it may abate anticipated difficulties arising out of those developers' subdivision projects. The Court cannot agree with Trappe Meadows that illegality is afoot merely because the Borough has enacted a variety of measures to remedy the problem. *See. e.g.*, Complaint ¶¶ 88.B, 95.B, & 99.B. To the contrary, the defendant's multifaceted regulatory scheme suggests a thoughtful and balanced approach calibrated to retrieving the social costs of development from those who have imposed them on the public. Developers are required to pay for services rendered by the Borough and to erect improvements in the immediate vicinity of their subdivisions or developments. They are commanded to tender capital contributions to finance municipal construction of public improvements outside the immediate area of their particular projects, which improvements are plainly related to the health and well-being of the Borough's residents and which are occasioned by the developments themselves. Nothing in the Constitution requires the Borough – and ultimately the community as a whole – to absorb those expenses in order to swell Trappe Meadows' coffers or reduce its business expenses.

C. Plaintiffs' State Claims

The Court declines to exercise pendant jurisdiction over the plaintiffs' state law claims, none of which even remotely implicates federal interests. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726-27, 86 S. Ct. 1130, 1139, 16 L, Ed. 2d 218 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."); *Hages v. Aliquippa & S. R. Co.,* 427 F. Supp. 889, 894 (W.D. Pa. 1977). The Court's refusal to proceed to the state counts is predicated primarily on two concerns, First, according to the plaintiffs, the issues raised in the state claims pertain to the municipality's taxing authority. That comprises terrain which federal courts are most reluctant to invade. *Evans v. Buchanan,* 468 F. Supp. 944, 957 (D. Del. 1979). Second, Pennsylvania law regarding municipal impact fees is rapidly evolving, and resolution of this controversy may involve the application of Act 209 as adopted by the Commonwealth's Legislature and signed into law on December 19, 1990. The state courts are better situated to resolve these novel issues, *Buethe v. Britt Airlines, Inc.,* 749 F.2d 1235, 1239-41 (7th Cir. 1984); *McGann v. Mungo,* 578 F. Supp. 1413, 1415-11 (D.S.C. 1982). Counts I, II, III, VII, VIII, XI, and XV of Plaintiffs' Complaint therefore will be remanded to the court from which they were removed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOMEBUILDERS ASSOCIATION OF BUCKS/MOMTGOMERY COUNTIES, INC. and TRAPPE MEADOWS, INC.	:	CIVIL ACTION
v.	:	
BOROUGH OF TRAPPE	:	NO. 90-3212

ORDER

AND NOW, this 3d day of May, 1991, for the reasons set forth in this Court's Memorandum dated May 3, 1991;

IT IS ORDERED that Plaintiffs' Motion for Summary is DENIED with respect to all federal claims alleged in Plaintiffs' Complaint and that Defendant Borough of Trappe's Motion for Summary Judgment is GRANTED with respect to all federal claims alleged in Plaintiffs' Complaint as follows:

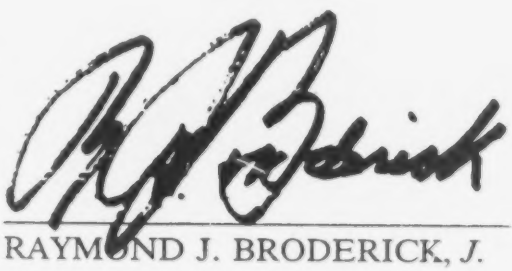
1. Plaintiff Homebuilders Association of Bucks/ Montgomery Counties, Inc. is DISMISSED as a party for lack of standing with respect to Counts IV, V, VI, IX, X, XII, and XIII of Plaintiffs' Complaint;

2. Counts V, IX, XII, and XIV of Plaintiffs' Complaint are DISMISSED for lack of ripeness;

3. Pursuant to Federal Fule of Civil Procedure 56, judgment is ENTERED in favor of Defendant Borough of Trappe and against Plaintiff Trappe Meadows, Inc. on Counts IV, VI, X, XIII, XVI, and XVII of Plaintiffs' Complaint;

AND IT IS FURTHER ORDERED that the parties' cross-applications for attorneys' fees and expenses are DENIED;

AND IT IS FURTHER ORDERED that Counts I, II, III, VII, VIII, XI, and XV of Plaintiffs' Complaint, which allege violations of Pennsylvania state law, are REMANDED to the Court of Common Pleas, Montgomery County, Pennsylvania, and that all motions filed in the above-captioned action not disposed of in this Order are DISMISSED as moot.



RAYMOND J. BRODERICK, *J.*

BUILDING CODE

ORDINANCE NO. 240

An Ordinance adopting as the building code of the Borough of Trappe, the BOCA National Building Code/1987, With certain amendments, additions and deletions, and repealing certain prior ordinances.

The borough of Trappe ordains as follows:

Section 1. Adoption of Building Code. For the purpose of establishing rules and regulations for the construction, alteration, removal, demolition, equipment, use and occupancy, location and maintenance of buildings and structures, including permits and penalties, in the Borough of Trappe, the Borough adopts the BOCA National Building Code/1987 (Tenth Edition), as published by Building Officials & Code Administrators International, Inc. Copies of that code have been placed on file with the Borough Secretary and will remain on file there. That entire building code, except for those portions that are deleted, amended or modified in the following sections of this ordinance, is adopted and incorporated as fully as if set out verbatim in this ordinance, and, from the date on which this ordinance takes effect, the provisions of that building code, as amended, shall be controlling in the construction of all buildings and structures within the limits of the Borough of Trappe. In this ordinance, the BOCA National Building Code may be referred to as "the code" or "this code".

Section 2. Amendments Made in BOCA National Building Code. The building code adopted by Section one of this ordinance is amended and changed in the following respects:

(1) Whenever the words "name of jurisdiction" appear in brackets in the code, the words, "Borough of Trappe" shall be inserted in place of those bracketed words. Likewise, the words "Borough of Trappe" shall be

substituted for the word jurisdiction" where that word appears singly without being precoded by the words "under the."

(2) The term "chief appointing authority of the jurisdiction" and the term "chief authority of the jurisdiction," as used in the code, shall mean the Borough Council.

(3) The term "legal officer of the jurisdiction," as used in the code, shall mean the Borough Solicitor.

(4) Wherever the term "code official" is used in the code, it shall mean the building official.

(5) Section 100.1 of the code is amended to read as follows:

"1100.1 Title: These regulations shall be known as The Building Code of the Borough of Trappe, hereinafter referred to as "the code" or "this code".

(6) Section 101.5 of the code is amended to read as follows:

"101.5 Validity of other laws, regulations and ordinances: Nothing in this code shall be construed to prevent the enforcement of other laws, State regulations and ordinances of this borough which prescribe more restrictive or stricter requirements or limitations. When the provisions specified in this code for health, safety and welfare are more restrictive than other provisions, this code shall control, but in any case, the most rigid requirements of either this code or other laws, regulations or ordinances shall apply whenever they may be in conflict."

(7) Section 103.4 of the code is amended to read as follows:

"103.4 Rehabilitation" Buildings existing prior to the effective date of this code in which there is work involving repairs, alterations, additions or changes of use, shall be made to conform to the code by applying the requirements of Article 32 or the provisions of Articles 2 through 31."

(8) Section 109.0 Department of Building Inspection, and all subsections under that section (109.1 through 109.9) are deleted.

(9) Section 110.0. Duties and Powers of the Code Official, and all subsections under that section (110.1 through 110.8) are deleted, and the following in substituted for that section"

"SECTION 110.0 BUILDING OFFICIAL

"110.1 Establishment of office of building official:

"a. The office of building official is created and the executive official in charge shall be known as the building official.

"b. The building official shall be appointed by Council for an indefinite term, and shall serve at the pleasure of Council.

"c. During temporary absence or disability of the building official, council shall designate an acting building official.

"110.2. qualifications of building official: To be eligible for appointment, the candidate for the position of building official shall have had experience as an architect, structural engineer, building inspector or superintendent of building construction; he shall be in good health, physically capable of making the necessary examinations and inspections. He shall not have any interest whatever, directly or indirectly in the sale or manufacture of any material, process or device entering into or used in or in connection with building construction, alterations, removal, and demolition.

"110.3 Powers and duties of building official:

"a. The building official shall enforce all the provisions of this code and shall act on any question relative to the mode or manner of construction and the materials to be used in the erection, addition to, alteration, repair, removal, demolition, installation of service equipment and the location, use, occupancy and maintenance of all

buildings and structures, except as otherwise specifically provided for by statutory requirements or as provided in 110.2 through 110.7

"b. The building official shall devote such time as is necessary to carry out the duties of his office. He may appoint such number of officers, technical assistants and inspectors as necessary for the administration of this code. The building official is authorized to engage such expert opinion as deemed necessary to report upon unusual technical issues that arise, subject to the approval of borough council. The building official and authorized representatives shall carry proper credentials of their respective offices when making inspections of buildings and premises in the performance of duties under this code.

"c. The building official shall issue all necessary notices or orders to remove illegal or unsafe conditions, to require the necessary safeguards during construction, to require adequate exit facilities in existing buildings and structures, and to insure compliance with all the code requirements for the health, safety and general welfare of the public.

"d. The building official shall receive applications required by this code, issue permits and furnish the prescribed certificates. He shall examine premises for which permits have been issued and shall make necessary inspections to see that the provisions of law and of this code are complied with and that construction is prosecuted safely. He shall, when requested by proper authority, or when the public interest so requires, make investigations in connection with matters referred to in this code and render written reports on the same. To enforce compliance with law, to remove illegal or unsafe conditions, to secure the necessary safeguards during construction, or to require adequate exit facilities in buildings and structures, he shall issue such notices or orders as may be necessary.

"e. Inspections required under the provisions of this code shall be made by the building official or his duly

appointed assistant. The building official may accept reports of inspectors or recognized inspection services, after investigation of their qualifications and reliability. No certificate called for by any provision of this code shall be issued on any such report unless the report is in writing and certified to by a responsible officer of that service.

"f. The building official shall keep comprehensive records of applications, of permits issued, of certificates issued, of inspections made, of reports rendered, and of notices or orders issued. He shall retain on file copies of required plans and all documents relating to building work so long as any part of the building or structure to which they relate may be in existance.

"g. All such records shall be open to public inspection for good and sufficient reasons at the stated office hours; but shall not be removed from the office of the building official without his written consent.

"h. The building official shall make written reports to Borough Council once a month, or oftener if requested, including statements of permits and certificates issued, and orders promulgated. He shall also submit to council an annual report in the form and content as shall be prescribed by council.

"110.4 Rule-making authority: The building official shall have power as necessary in the interest of public health, safety, and general welfare, to adopt and promulgate rules and regulations to interpret and implement the provisions of this code to secure the intent thereof and to designate requirements applicable because of local climatic or other conditions; but such rules shall not have the effect of waiving structural or fire performance requirements specifically provided in this code or violating accepted engineering practice involving public safety. Provided, however: Borough Council shall have authority at its discretion, to abrogate any rule or regulation, or part thereof, in which case that rule or regulation or part thereof shall cease to be in effect in the Borough.

"110.5 Compensation of building official: Compensation of the building official shall be one-half (½) of the building permit fee as collected from the applicant, but his total compensation as building official and mechanical official shall not exceed $30,000 in any one year. Any compensation in excess of $30,000 in any one calendar year shall be retained by the borough.

"110.6. Liability of building official and other enforcement personnel: The building official or any employee charged with the enforcement of this code, acting in good faith and without malice for the borough in the discharge of his duties, shall not thereby render himself liable personally and he is hereby relieved from all personal liability for any damage that may accrue to persons or property as a result of any act required or by reason of any act or omission in the discharge of his duties. Any suit brought against the building official or employee, because of any such act or omission performed by him in the enforcement of any provisions of this code, shall be defended by the borough solicitor until final termination of the proceedings.

110.7 Cooperation of other officials with building official: The building official may request and shall receive so far as may be necessary, in the discharge of his duties, the assistance and cooperation of other officials of the borough.

(10) The following is added at the end of Section 111.1 of the code:

"Application may also be made for a temporary permit which shall be valid for not more than 30 days. Provided, however: such temporary permits may be renewable by advance written notice to the building official."

(11) Section 114.3.1 of the code is amended to read as follows:

"Payment of fees; duration of building permit; issuance of use and occupancy permit:

"a. No permit required by this code shall be issued until the fee prescribed in this section shall have been

paid. Nor shall an amendment to a permit be approved until the additional fee, if any, due to an increase in the estimated measure of the building or structure, shall have been paid.

"b. For a permit for the construction, alteration or repair of a building or structure, the fee shall be as follows; Single-family and two family dwellings, multi-unit and accessory use buildings. commercial and institutional buildings, industrial and non-residential buildings: one percent (1%) of the total construction value. The minimum fee for a permit shall be $15. The building official shall require proof of costs where he is not satisfied with estimates as submitted by the applicant for permit. All estimates shall become a permanent record of the borough and shall be kept with the application.

"c. For a permit for the removal of a building or structure within the same lot, or from one lot to another, the fee shall be at one percent (1%) of the estimated costs of moving, foundation costs, and all other work necessary to replace the building or structure. The building official shall require proof of costs if not satisfied with the permit estimates as submitted. All estimates shall become the permanent record of the borough, and kept with the application.

"d. For a permit for the demolition of a building or structure the fee shall be at the rate of three dollars ($3) for each ten (10) feet in height of the building or structure plus one percent (1%) additional for each foot of street frontage of the building or structure in excess of 50 feet. There shall be a minimum fee of $10 for a demolition permit for an accessory building or structure, a minimum fee of $50 for demolition permit for a residential building or structure, and a minimum fee of $100 for a demolition permit for an institution or commercial or industrial building or structure.

"e. In case of abandonment or discontinuance of a project for which a permit was issued, no refund of the permit fee or any part of the permit fee shall be made.

Following abandonment or discontinuance of a project no work shall be resumed until a new application has been made and a new permit has been issued.

"f. The term "estimated cost", as used in this section means the reasonable value of all services, labor, materials, and use of scaffolding and other appliances or devices entering into and necessary to the prosecution and completion of the work ready for occupancy; provided that the cost of excavation or grading, and of painting, decorating or other work that is merely for embellishment or not necessary for the safe and lawful use of the building or structure, is not deemed a part of such estimated cost.

"g. If there is a transfer or change in the contractor or developer for any new construction of a residential building, and/or commercial and/or industrial building, there shall be an additional charge of $50 payable to the borough, to effectuate the change in the permit to the new contractor and/or developer.

"h. For a permit for the construction of an inground swimming pool, the fee shall be one percent (1%) of the total construction value. The building official shall require proof of costs if not satisfied with the permit estimates as submitted. All estimates shall become a permanent record of the borough and kept with the application.

"i. For a permit for construction of a driveway and/or parking area on a residential lot, the fee shall be $15.

"j. For a permit for a driveway and/or parking area on a commercial and/or industrial lot, the permit fee shall be one percent (1%) of the total construction value. The building official shall require proof of costs if not satisfied with permit estimates as submitted. All estimates shall become the permanent record of the borough and shall be kept with the application.

"k. If construction and/or alteration of a building or structure is not complete within two (2) years of the issuance date of the building permit, a new building permit shall be required at the original costs. After the

two (2) year date and the expiration of the building permit, no vested rights shall be inure to the owner thereof.

"l. Before a residence is established or storage permitted in a building, an occupance permit shall be issued by the building official.

"m. The above-prescribed fees charged for the issuance of permits maybe revised and amended periodically by resolution adopted by council at a regular meeting.

(12) Section 114.4 of the code is amended to read as follows:

"114.4 Records: The building official shall keep an accurate record of fees collected for building permits and shall deposit those fees with the Borough Secretary.

(13) Section 114.5 of the code is amended to read as follows: .

"114.5 Refunds: In the case of revocation of a building permit or abandonment or discontinuance of a building project, no fee or part of a fee shall be refunded.

(14) Section 115.4 of the code is amended to read as follows:

"115.4 Right of entry: The building official, in the discharge of his official duties, and upon proper identification shall have authority to enter any building, structure or premises at any reasonable hour.

(15) Section 117.4 of the code is amended to read as follows:

"117.4 Violation penalties: Any person who violates or fails to comply with any provision or requirement of this code, or who erects, constructs, alters or repairs a building or structure or any part of a building or structure in violation of a detailed statement or plan submitted under this code, or of a permit or certificate issued as provided in this code, shall be guilty of a violation of this code, and, upon conviction, shall be sentenced to pay a fine of not more than $300 and costs of prosecution, and, in default of payment of the fine and costs, to imprisonment for not more than 30 days. The owner of a building or structure or part of a building or structure, or of the

premises where anything in violation of this code shall be placed or shall exist, and any architect, engineer, builder, contractor, agent, person or corporation employed in connection therewith, and who may have assisted in the commission of any such violation shall be guilty of a separate offense, and, upon conviction shall be sentenced to pay a fine of not more than $300 and costs of prosecution, and, in default of payment of fine and costs, to imprisonment for not more than 30 days. Provided: each day's continuance of a violation shall constitute a separate offense.

(16) Section 118.2 of the code is amended to read as follows:

118.2 Unlawful continuance: Any person who continues to work in or about a structure after having been served with a stop-work order, except such work as that person is directed to perform to remove a violation or unsafe condition, shall be guilty of a violation, and, upon conviction, shall be subject to the penalty prescribed by section 117.4 of this code.

(17) Section 120.0 of the code and all subsections thereunder (Sections 120.1 through 120.6) are deleted and the following is substituted for that section and subsections:

SECTION 120.0 UNSAFE BUILDINGS AND STRUCTURES

120.1 Investigation; definition: Whenever it shall be reported to council that any building or structure, completed or in the process of construction, or any portion thereof, is in an unsafe condition, council shall immediately cause an investigation and examination to be made of that structure. If that investigation or examination indicates the structure to be unsafe in any respect, a report in writing shall be made to council specifying the exact condition of the building or structure, and setting forth whether the building or structure is capable of being properly repaired or whether it should be removed as an unsafe structure. PROVIDED: the term 'unsafe'

when applied to any building or structure shall include any of the following: a building or structure or part thereof that is structurally unsafe, unstable, unsanitary, inadequately provided with exit facilities, constituting a fire hazard; unsuitable or improper for the use or occupancy to which it is put; constituting a hazard of health or safety because of inadequate maintenance, dilapidation, obsolesence or abandonment; or otherwise dangerous to life or property; vacant buildings or structures or portions thereof deemed to constitute a hazard.

"120.2 Notice to repair or remove: If any building or structure shall be reported to the council. as provided in section 120.1 to be in an unsafe condition, the building official, upon request of council, shall forthwith cause written notice to be served upon the owner of that building or structure. That notice shall require the owner of the building or structure to commence the repair or removal of the building or structure within ten (10) days of that notice or to complete the repair or removal within 30 days thereof. Provided, however, that in any case where the notice directs the repair of any building or structure, the owner shall have the option to remove the building or structure instead of making repairs to it, within the stated time limit.

"120.3 service of notice: The notice required by Section 120.2 shall be served personally upon the owner of the building or structure to which that notice refers, if that owner is a resident of the Borough. If the owner is not a resident, then the notice may be served upon the agent of the owner, if that agent has a residence or place of business within the borough, or the notice may be served upon a tenant or occupant of the structure. If the owner has no agent or tenant or if there is no occupant of the building or structure, the service shall be by notice posted upon the building or structure, and, in addition, a copy of the notice shall be sent to the owner of the building or structure, by certified mail, at the last known address thereof.

120.4 Failure to comply constitutes violation. If the owner of an unsafe building or structure to whom or which a notice to repair or remove the building or structure shall have been sent under the provisions of this section, fails to commence to complete the repair or removal within the time limit prescribed by the notice, he shall be guilty of a violation of this code and shall be subject to the penalty herein prescribed for the violation thereof, and that penalty and costs of prosecution may be in addition to costs and expenses collected under Section 120.5

"120.5 Authority for borough to do work at expense of owner: If the owner of any unsafe building or structure, to whom or which a notice to repair or remove the structure shall have been sent under the provisions of this section, fails to commence or complete that repair or removal within the time limit prescribed by the notice, council shall have authority to cause that work or repair or removal to be commenced and/or completed, as the case may be, by the borough, and the cost and expense of the work, with a penalty of ten percent (10%), shall be collected from the owner of the building or structure, in the manner provided by law. Provided: the recovery of that cost and expense, together with the penalty, may be in addition to the penalty imposed for violation of this code, as provided by Section 117.4.

120.6 Appeal; disregard of unsafe notice: A person served with a notice or order to remove or repair an unsafe building or structure or portion of a building or structure shall be allowed 30 days in which to comply with the requirements of the notice or order. Provided: any person served with such a notice or order may, within ten (10) days after service upon him, appeal from the notice or order to council, and if council confirms the notice or order, the person on whom it was served shall comply with the terms of the notice or order within 30 days after the date of confirmation by council. Council may institute an appropriate action in court to compel compliance.

(18) Section 123.0 of the code, Board of Survey, and all subsections of the code (Sections 123.1 Through 123.5.5) are deleted.

(19) Section 124.2 of the code is amended to read as follows:

"124.2 Council serves as board of appeals: Council shall serve as the board of appeals and shall have all authority, shall perform all duties, and may exercise all powers vested in the board of appeals by this code.

(20) Sections 124.2.1 through 124.2.6 of the code are deleted.

(21) Section 124.4 of the code is amended to read as follows:

124.4 Notice of meeting; Council, when meeting as a board of appeals, shall give notice of all such meetings in the same manner as required for special meetings of council.

(22) Section 124.5 of the code is deleted.

(23) Section 124.6 of the code is amended to read as follows;

124.6 Action of the board: The board shall affirm, modify or reverse the decision of the building official by a concurring vote of a majority of the members of the board present at the meeting.

(24) The following new section is added directly after Section 124.6.2:

"124.6.3. Determining vote: Failure to secure concurring votes of a majority of the members of the board present at a meeting shall be deemed a confirmation of the decision of the building official.

(25) The definition of the term "building line" as that term is defined in section 201.1 of the code, is amended to read as follows:

"Building line: a line, established by ordinance or appearing on an officially accepted lot plan, beyond which a building shall not extend.

(26) section 602.9.3 of the code, Emergency Systems, is amended by adding the following at the end of the section:

"Exits shall be required both by lights near the ceiling and, at floor level, the latter by an indicating light visible in all directions, to be located within one (1) foot of the fire exit door. Floor lights shall be red in color and have a candle power giving a valve of not less than 10 foot candles on the illuminated surface.

"Fire exit markings shall be located at floor level no greater than 25 feet apart, indicating closest fire exit. Fire exit doors will be indicated on door as "Fire Exit"; marking and signs shall be approved by the Fire Marshalls office."

(27) Under Section 908.0, Fire Walls and Party Walls, the following sections are deleted: Section 908.5, Continuity of Walls; Section 908.5.1, Noncombustible roofs: Section 908.5.2, Combustible roofs; and section 908.5.3 Noncombustible frame.

(28) Section 910.3 of the code is amended to read as follows:

"Multiple single-family dwellings: Single-family dwelling units (Use - Group R.-3) located above or adjacent to other single-family dwelling units (Use Group R-3) for the purpose of determining the applicable provisions of this code, provided each dwelling unit is completely separated from the adjacent dwelling unit(s) by fire separation wall(s) of masonry or block-wall construction, with the wall extending at least two (2) feet, eight (a) inches above the roof surface.

(29) Section 1002.1 of the code, dealing with fire suppression systems is amended to read as follows:

"1002.1 Where required: Fire suppression systems shall be installed and maintained in full operating condition, as specified in this code, in the locations indicated in Sections 1002.2 through 1002.21," and to add the following note at the end of the section:

"Note: Building in use group classifications that have specified exceptions or explanations; Sections 1002.2, 1002.3, 1002.4, 1002.5, 1002.6 and 1002.8 shall be required to be equipped with an automatic detection system where and when a suppression system is not

required. The automatic detection system shall conform to the subsections of section 1018.0, where applicable."

(30) Section 1002.4 of the code is amended to read as follows:

"Use Group A-3: in all buildings or structures or portions thereof of Use Group A-3 when more than 5,000 square feet (465 m^2) in area."

(31) Section 1002.9 of the code is amended to read as follows:

"1002.9 Use groups M, S-1 and F-1; In all buildings or structures or portions thereof of Use Groups M, S-1 and F-1:

When more than 5000 square feet (465 m^2) in area or

When more than 10,000 square feet (930 m^2) in total area on all floors: or

When more than three (3) stories in height"

(32) The following new section is added to the code directly after Section 1018.6:

"1018.7 Dwelling units; change of occupancy: At every change of occupancy of a dwelling unit after the effective date of this ordinance, whether the change is occasioned by or incidental to a sale, lease or sublease of the unit, it shall be the duty of the grantor of the unit (i.e., the seller, lessor or sublessor, as the case may be) to provide, before occupancy, all smoke detectors as required by this section (or by any other applicable law, ordinance or regulation in proper working condition. Failure to comply with this subsection shall constitute a violation of this code, and the violator shall be subject to the penalty prescribed in this for violations. Provided: this subsection shall not be construed to vitiate or render void any contract, lease or sublease subject to this subsection."

(33) Section 1106.2 of the code is amended so that Table 1106, directly following that section, entitled Minimum Uniformly Distributed Live Loads, will require the second floor and habitable attics of dwellings to withstand a live load of 40 psf.

(34) Section 1222.2.2 of the code and the accompanying chart, Table 1222.22, entitled Thickness of Foundation Walls are amended to require 12-inch block-masonry walls and a minimum requirement of ten (10) inches for mass concrete walls. All other thickness included on the chart are deleted.

(35) Section 1224.8 of the code is amended to add the following at the end of the section:

Unless otherwise provided, splash blocks shall be installed at the bottom of down-spouts, and shall be constructed of concrete or other acceptable material to carry the water at least three (3) feet from the building. Rain conductors shall not discharge water over the sidewalk of a street, but shall be installed under the sidewalk through metal pipe so as to discharge water into the gutter at the curb line."

(36) Section 1603.4 of the code is amended by adding the following at the end thereof:

"All dry wall shall have a minimum nominal thickness of one half (½) inch, Total wall area of all bathroom areas (full or partial) shall have minimum one-half (½) inch waterproof or moisture resistant drywall/wallboard applied to all wall areas."

(37) Section 1710.2 of the code is amended to read as follows:

"1710.2 Plywood for interior use: Plywood for interior use shall be either of the interior type, moisture-resistant type, or exterior type."

(38) The following new section of the code is added directly after Section 1710.2:

"1710.2.1. Exterior wall coverings: (Wood frame construction, including wood in combination with other materials, unless otherwise prohibited.) Where plywood is used for covering the exterior of outside walls, and soffits, etc. shall be of the exterior type, not less than three-eighths (⅜) inches thick. Panel joints shall be backed solidly by studs or by nailing pieces not less than two (2) inches wide, except over sheathing or where

applied as lapped siding, or otherwise made waterproof to the satisfaction of the building official."

(39) Sections 1710.3.1, 1710.3.1.1, 1710.3.2 and 1710.3.2.1 are deleted and the following new sections are substituted for them:

"1710.3.1. Plywood side-wall sheathing: Sheathing shall be not less than one half (½) inch in thickness and no closer than eighteen (18) inches to the ground unless it is of exterior grade, but in no case less than 12 inches above finished grade.

"1710.3.1.1. Plywood sheathing of roofs: Where plywood is to be used on roofs of more than three (3) inches in 12-inch pitch with rafters of 16 inch on center, no less than three-eighths (⅜) inch rough shall be used.

Where the roof is less than three (3) inches in 12 inch pitch and rafters on 16 inch on center, there shall be no less than one-half (½) inch in thickness.

Where the rafters are spaced as 24 inch on center, there shall be no less than one-half (½) inch in thickness using clips between rafters.

"1710.3.2. Plywood for subfloor: Where plywood is used for subflooring under three-fourths (¾) inch or thicker finished flooring, five-eighths (⅝) inch rough plywood may be used.

Where floor covering of less than three-fourths (¾) inch is to be used, there shall be no less than three-fourths (¾) inch plywood subfloor."

(40) Section 1710.3.3 is amended to read as follows:

"1710.3.3. Nailing of plywood: Plywood sheathing on roofs or sidewalls and plywood subflooring shall have nailings to at least 6 penny common nails spaced not more than six (6) inches on centers of edge bearings and twelve (12) inches on other bearings. Exterior plywood siding, where also functioning as structural sheathing shall have equivalent nailing."

(41) Article 24. Masonry Fireplaces, is deleted, and the following new article is adopted in its place:

"ARTICLE 24
"CHIMNEYS AND HEATING APPLIANCES
"SECTION 2400.0. GENERAL

"2400.0. Scope: This article shall govern the design, installation, maintenance, repair and approval of all chimneys and heating appliances.

"SECTION 2401.0. CHIMNEYS

2401.1. Construction:

"a. All chimneys, hereafter erected, altered or repaired shall be built of brick, concrete or other solid masonry; on solid masonry foundations, properly proportioned to carry the weight imposed without danger of settlement or cracking. The walls shall be no less than eight inches in thickness when not lined. Hollow masonry shall not be used for the walls of chimneys.

"b. Chimneys from the underside of roof rafters to their tops, in buildings of Type III, IV, and v construction shall be laid in cement mortar.

"c. Concrete chimneys cast in place shall be suitably reinforced vertically and horizontally. The walls shall be not less than six (6) inches and shall be lined with fire clay flue linings.

"d. Flue linings may be omitted in reinforced concrete chimneys for private dwellings, provided the walls of the chimneys be not less than six inches thick and provided further that quartz gravel, limestone or other material liable to damage by heat, shall not be used as the course aggregate.

"e. Concrete blocks used in chimney construction shall have walls not less than 3¾ inches thick with suitable steel reinforcement completely encircling the blocks and well embedded in them. All concrete block chimneys shall have fire clay flue linings.

"2401.2. Height of chimneys: All chimneys shall extend to at least three feet above a flat roof, and two feet above the ridges of a pitched roof, except that in the case of sloping roofs, the chimneys may be lower provided

that the top of such chimney is not closer than ten feet to the nearest portion of the roof, measured in a horizontal plane.

"2401.3. Smoke test before use: If so directed by the building official, all chimneys shall be subject to a smoke test after the mortar has thoroughly hardened. Should this indicate openings, they must be made tight before making use of the chimney.

"2401.4. Use of wood furring: No wood furring shall be used against or around any chimney unless the walls are at least eight (8) inches thick and the flue is lined with fire clay flue lining.

SECTION 2402.0. FLUES AND FLUE LININGS

"2402.1. Requirements for flue linings:

"a. All flues, where so required, shall be lined throughout their full height with fire clay or terra cotta flue lining not less than eight (8) inches by eight (8) inches by three-fourths inches thick when surrounding masonry is less than eight inches in thickness. Joints to be set into and made tight with cement or cement-lime mortar and all spaces between masonry and linings shall be completely filled with mortar.

b. No parged or plaster lining of flues may be done. Flue linings shall not be made of salt glazed terra cotta pipe. No broken flue lining may be used. Flue linings shall start four (4) inches below the bottom of smoke pipe intakes or from the throat of fireplaces and shall be continuous the entire height of the flues and shall project four (4) inches above the chimney top. Where sharp angles occur, shaped sections must be used.

c. Not more than two (2) flue linings will be permitted in the same flue space. In party walls flue linings must be separated by at least eight (8) inches thickness of masonry.

"2402.2. Corbels: No chimney or flue shall be corbeled out more than 25 per cent of its width unless supported on iron or steel, but must start from the foundations on the same face as the breast above.

"2402.3. Pipe openings into flues: All pipe openings to smoke flues shall be lined with terra cotta crocks or thimbles.

"2402.4. Proximity of wood members· In no building shall any wood girder, joists or timbers be placed nearer than two (2) inches to the well enclosing any smoke, hot air or other flue.

"SECTION 2403.0. HEARTHS AND FIREPLACES

"2403.1. Requirements for hearths and fireplaces:

"a. All hearths shall be supported by trimmer arches of stone, brick, iron or concrete.

"b. The brick lambs of every fireplace or grate opening shall be at least nine (9) inches wide each, and the backs of such openings shall be at least nine (9) inches thick.

"c. All hearths and trimmer arches shall be at least 12 inches longer on either side than the width of such openings, and an outer hearth at least 15 inches wide, in front of the chimney breast. Brickwork over fireplaces and grate openings shall be supported by iron bars or bricks or stone arches.

"2403.2. Proximity of woodwork: No wood mantel or other woodwork shall be placed within eight inches of the sides or within eight inches of the top of any fireplace opening. Wood centering under trimmer arches shall be removed before plastering the ceilings underneath, or on completion of the building.

"SECTION 2404.0. PORTABLE RANGES AND HEATERS

"2404.1. Certain ranges and heaters to be set on hearths: All brick-set or portable ranges other than gas or electric ranges shall be set on hearths of brick, slate or concrete, the hearts to extend at least twelve inches beyond thc face of the range.

"2404.2. Proximity to combustible partitions; No brick-set or portable range, or heating apparatus of any kind other than gas or electric ranges, shall be set against a wood or lath and plaster partition, and such gas or electric range shall clear partition by three inches.

"Section 2405.0. STOVE AND SMOKE PIPES

"2405.1. Stove pipes: No stove pipe in any building with combustible floors and ceilings shall hereafter enter any flue nearer than 18 inches from the floor or ceiling.

"2405.2. Smoke pipes; In all cases where hot water, steam, hot air or other furnaces are used, the furnace's smoke pipe shall be at least 18 inches below the joists or cellings above the same, unless such joists or ceilings shall be properly protected by a shield of non-combustible material suspended above the said pipe, in which case the smoke pipe shall be kept at least 12 inches from the joists or ceilings.

"SECTION 2406.0. HOT AIR REGISTERS

"2406.1. Requirements: All hot air registers set in the floor or any building shall be set in a border of a non-combustible material, and all floor or register boxes shall be made of sheet metal with flange on top to fit the groove in the border, the register to rest upon the same, and there shall also be an open space of two inches on all sides of the register box, extending from the underside of the ceiling to the border of the floor, the outside of the space to be covered with a casing of metal, the full depth of the floor and made tight on all sides.

"SECTION 2407.0. HOT AIR PIPES

"Requirements: All hot air pipes in partition walls shall be covered with asbestos paper and shall have an air space of at least one inch between the pipe and the woodwork. Plaster enclosing hot air flues shall be upon metal lath."

(42) Article 27 of the code, "Electric Wiring, Equipment and Systems," is deleted, and in its place the Borough adopts by reference the National Electrical Code, published by the National Fire Protection Association, (70-84).

(43) Article 28 of the code, "Plumbing System," is deleted, and plumbing matters shall be governed by the borough's plumbing code.

(44) Section 2901.2 of the code is amended to read as follows:

"2901.2 New signs: No new sign shall be erected, constructed altered or maintained except as provided in this article, nor until a permit has been obtained from the building official as well as any permit required under the zoning ordinance, nor until any bond or.insurance policy required under Section 2906.1 of this code has been filed."

(45) Section 2903.2.4 of the code is amended to read as follows:

"2903.2.4. Signs within street or alley lines: signs, including but not limited to projecting and other overhanging signs, shall not be permitted within street or alley lines, except for the following:

(a) transit directions, as referred to in Section 1902.3.2;

(b) street signs, as referred to in Section 1902.3.3;

(c) official signs, erected by authority of the Vehicle Code or to give notice of provisions to the Borough's traffic or parking ordinances;

(d) temporary signs giving notice of detours and/or warning of construction work or hazards;

(e) miscellaneous and temporary signs as referred to and regulated by Section 2913.0."

(46) Section 2906.1 is amended to read as follows:

"2906.1. Filing: If so required by council from any person who desires to erect, install, remove, rehang or maintain over any street, alley, public way or public property any sign for which a permit is required under this code, that person shall file with the borough a bond or a public liability and property damage insurance policy in the amount and from the source approved by the solicitor."

Section 3. Interpretation. In interpreting any provision of the building code adopted by Section one of this ordinance, the following principles shall be governing:

(a) That code shall not supersede any provision of the law of the Commonwealth of Pennsylvania or of any

regulation promulgated by any department or agency of the Commonwealth by authority of law, where that law or regulation is in conflict with or identical to a provision of that building code. Provided, however: any provision of that building code that is stricter than or in addition to any State law or regulation governing a particular subject or activity shall be in effect and shall be enforced within the Borough of Trappe, subject to the penalties prescribed in Section two of this ordinance for a violation of the code.

(b) Mention in or regulation by the building code of any specific use of property, or of any business or industry, shall not in itself authorize that use of property or the establishment or carrying on of that business or industry in the borough. It is declared that the intent of council is that permitted and prohibited uses of property in the borough shall be governed by the borough's zoning ordinance, its amendments and supplements.

Section 4. Saving clause: Nothing in this ordinance or in the building code adopted by Section one of this ordinance shall be construed to affect any suit or proceeding now pending in any court, or any rights acquired, or liability incurred, or any cause or causes of action accrued or existing, under any ordinance repealed by this ordinance. Nor shall any right or remedy of any character be lost, impaired or affected by this ordinance.

Section 5. Validity. The Council of the Borough of Trappe declares that should any section, paragraph, sentence, clause or word of this ordinance, or of the building code adopted by Section one of this ordinance, be declared to be unconstitutional, illegal or invalid, that decision shall not affect the validity of any of the remaining provisions of this ordinance or of that building code. It is declared as a legislative intent that this ordinance and that building code would have been adopted had the unconstitutional, illegal or invalid provision not been inclued in either.

Section 6. Repeal of certain prior ordinance. The following ordinances are repealed:

Ordinance Number	Date	Subject
1. 163	April 6, 1970	Adoption of 1967 Edition of the National Building Code, with certain changes
2. 163-A	June 3, 1974	Amendment of Ordinance No. 163
3. 163-A	October 3, 1978	Amendment of Ordinance No. 163
4. 163-B	December 3, 1985	Amendment of Ordinance No. 163 to change permit fees.

ADOPTED by the Borough Council and the Mayor of the Borough of Trappe this 7th day of July, 1987.

TRAPPE BOROUGH,
MONTGOMERY COUNTY, PA

BY: Arturo N. Lopez
Arturo N. Lopez, President
Borough Council

ATTEST:

Bonnie L Moore
Bonnie L. Moore, Secretary

APPROVED this 7th day of July, 1987.

Raymond B Ziegler
Raymond B. Ziegler, Mayor

ORDINANCE NO. 245

AN ORDINANCE OF THE BOROUGH OF TRAPPE, MONTGOMERY COUNTY PENNSYLVANIA, TO REGULATE THE WATER SUPPLY FOR THE BOROUGH OF TRAPPE.

BE IT ORDAINED AND ENACTED, by the Borough Council of the Borough of Trappe, Montgomery County, Pennsylvania, and it is hereby ORDAINED AND ENACTED by the authority of the same, that:

Section 1. Any person, firm, or corporation applying for water service shall pay a capital contribution charge of One Thousand ($1,000.00). Dollars per EDU on all new residential, commercial and industrial construction (any construction not connected to the Collegeville-Trappe Joint Water System lines). Said payment to be made to the Trappe Borough Secretary at the time that a building permit is requested, with the monies to be deposited into the Trappe Borough Water System Account. In the event of any subdivision, subsequent expansion of commercial, industrial or residential use, each unit will be obligated to pay the before mentioned charge in proportion to the number of EDU's subdivided or expanded. This capital contribution charge shall include conversions of single-family homes into two-family homes for each additional EDU, or fraction thereof, where the property has been previously connected to the Collegeville-Trappe Joint Water System. In case of commercial and industrial construction, or subsequent expansion, the initial EDU's will be estimated based on information provided by the commercial or industrial institution and as accepted by the Collegeville-Trappe Joint Water System's engineer. At the end of one (1) year period, or in subsequent annual evaluation at the descretion of the Collegeville-Trappe Joint Water System, the said System will review the commercial or industrial establishment and its water useage, divide the water useage per quarter by the then current value of water useage per EDU to determine the number of

EDU's or fraction thereof. Should the EDU's calculated by the above method be greater than the anticipated EDU's paid at the time that the owner sought a building permit, the commercial/industrial establishment shall pay the Borough the additional EDU's Said payment will be within thirty (30) days of the date of notice from the Collegeville-Trappe Joint Water System to the property owner. If the payment is not made, the Joint Water System may turn off the water supply to the property owner until payment is received. In the event that the EDU's calculated in less than the initial EDU's anticipated, no reimbursement will be made."

Section 2. – Charge for Tapping and Related Services. The Borough will make a charge of Seven Hundred ($700.00) Dollars for services for opening the street, tapping the main, supplying services to the pipeline, supplying a corporation cock, curb stop, curb box, meter and meter coupling.

"In the case of services in excess of one (1) inch, of the Borough's charge for opening the street, tapping the main, supplying service to the pipeline, supplying their corporation cock, curb stop, curb box, meter and meter couplings shall be the actual cost of materials used and labor supplied plus ten (10%) percent of the total of the material and labor costs.

"The lateral shall not be covered until the tap on the main is made and the lateral is connected and tested. A suitable check valve and pressure reducing valve shall be placed between the stop and waste cock and valve and the meter.

"In cases of state highways, the Borough will, at the request of the owner, make an application for the opening of the street, the cost of the application to be at the expense of the owner.

Section 3. All Ordinances or Resolutions or parts of Ordinances or Resolutions inconsitant herewith are hereby repealed.

ORDAINED AND ENACTED by the Council of the Borough of Trappe, this 1st day of September, A.D. 1987.

ATTEST: BOROUGH OF TRAPPE

Sandra L. Metzger,
Secretary

BY: Arturo N. Lopez
Arturo N. Lopez, President
Trappe Borough Council

APPROVED BY THE MAYOR OF THE BOROUGH OF TRAPPE this 1st day of September, A.D., 1987.

Raymond B. Ziegler,
Mayor

ORDINANCE, NO. 248

AN ORDINANCE OF THE BOROUGH OF TRAPPE, MONTGOMERY COUNTY, PENNSYLVANIA, TO AMEND ORDINANCE REGULATING THE WATER SUPPLY AND FEES FOR CAPITAL CONTRIBUTIONS TO THE BOROUGH OF TRAPPE

BE IT ORDAINED AND ENACTED by the Borough Council of the Borough of Trappe, Montgomery County, Pennsylvania, and it is hereby ORDAINED AND ENACTED by the authority of the same, that:

SECTION 1. The Borough of Trappe Code of Ordinances, Section 11-2051, imposition of capital contribution charge, shall be amended as follows:

> "Any person, firm or corporation applying for water service shall pay a capital contribution charge of $1,500 per EDU, or such charge as shall be duly adopted by resolution by the Borough of Trappe, on all residential, commercial and industrial construction, which is to be connected to the Collegeville-Trappe Joint Water System, or where such construction is for a use, present or in the future, for any EDU use over and above that which is presently being used. Said payment to be made to the Trappe Borough Secretary at the time that a building permit is requested, with the monies to be deposited into the Trappe Borough Water System Account. In the event of any subdivision, subsequent expansion of commercial, industrial or residential use, each unit will be obligated to pay the before mentioned charge in proportion to the number of EDU's subdivided or expanded. This capital contribution charge shall include conversions of single-family homes into two-family homes for each additional EDU or fraction thereof, where the property has been previously connected to the Collegeville-Trappe Joint Water System. In case of commercial and industrial construction, or subsequent expansion, the initial

EDU's will be estimated based on information provided by the commercial or industrial institution and as accepted by the Collegeville-Trappe Joint Water System's engineer. At the end of one (1) year period or in subsequent annual evaluation at the discretion of the Collegeville-Trappe Joint Water System, the said system will review the commercial or industrial establishment and its water usage, divide the water usage per quarter by the then current value of water usage per EDU to determine the number of EDU's or fraction thereof. Should the EDU's calculated by the above method be greater than the anticipated EDU's paid at the time that the owner sought a building permit, the commercial/industrial establishment shall pay the Borough the additional EDU's. That payment will be within 30 days of the date of notice from the Collegeville-Trappe Joint Water System to the property owner. If the payment is not made, the Joint Water System may turn off the water supply to the property owner until payment is received. In the event that the EDU's calculated is less than the initial EDU's anticipated, no reimbursement will be made. (Ord. No. 245, 9/1/1987, Sec. 1).

ORDAINED AND ENACTED by the Borough Council of the Borough of Trappe, this 21st day of December, 1987.

BY: Arturo N. López
President of Council

ATTEST: Sandra L. Mertz
Secretary

APPROVED this 21st day of December, 1987.

Ray D. Jurgens
Mayor

91-1392 (2)

Supreme Court, U.S.
FILED
MAR 24 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

HOMEBUILDERS ASSOCIATION OF BUCKS/
MONTGOMERY COUNTIES, INC.
AND
TRAPPE MEADOWS, INC.
Petitioners

v.

BOROUGH OF TRAPPE
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

Lawrence Sager, Esquire
Counsel of Record
SAGER & SAGER ASSOCIATES
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Pottstown, PA 19464
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Attorney for Respondent

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JURISDICTIONAL STATEMENT

The petitioner, Homebuilders Association of Bucks/Montgomery Counties, Inc., has not applied for any building permits in the Borough of Trappe, nor has that corporation paid any of the fees in question. The District Court dismissed the claims presented by Homebuilders Association of Bucks/Montgomery Counties, Inc. for lack of standing. The Court of Appeals affirmed. That issue has not been preserved in this petition for writ of certiorari; and thus, the dismissal of the claims of Homebuilders Association of Bucks/Montgomery Counties, Inc. for lack of standing, is res judicata. Accordingly, it has no standing to present the purported taking claims under the Fifth Amendment or the substantive due process claims under the

Fourteenth Amendment to this Court.

Petitioner seeks to have this Court review the standard for determining whether a legislative regulatory enactment violates substantive due process. The issue as to whether some other standard than a rational basis should have been used by the district court was neither argued nor briefed before the Court of Appeals. Accordingly, it should not be considered on certiorari. *Miree v. DeKalb County*, 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977).

STATEMENT OF THE CASE

On October 28, 1987, L & W Associates presented the Trappe Meadow subdivision and development plan for review before the Borough of Trappe, Pennsylvania. The plan provided for the subdivision of a parcel of land into seventy-one (71) single family

residential building lots (R.799a-800a, 803a). On November 13, 1987, L & W Associates assigned their rights in the agreement for the sale of the Trappe Meadow tract to Louis Besa, who in turn assigned the agreement to Trappe Meadow partnership (R.190a-202a). On July 10, 1989, Trappe Meadow, Inc. was formed and the partnership assigned the agreement to the corporation (R.203a).

Trappe Meadow, Inc. purchased the seventy-one developable lots at $45,000 per lot for a total consideration of $3.2 million for land costs alone, without any public improvements (R.804a-806a). The developer estimated that the cost for the development of the public improvements, including roads, sewer system, water supply system and storm drainage systems within the development would cost approximately $1.5 million more (R.803a). Single family residences

to be constructed on the seventy-one lots would have a mean sale price of $269,000 each. For each house, the developer would pay a building permit fee of $1,000 on $100,000 construction costs, a tapping in fee to the Collegeville-Trappe Joint Water System of $700, and a capital contribution to the Collegeville-Trappe Joint Water System of $1,500 or a total of $3,300 for each lot, or a little more than 1.2% of the total sales price. In consideration of receiving that payment, the Borough of Trappe would inspect the construction of the residence to assure compliance with the building, plumbing and electric codes of the municipality, allow and inspect the connection to the public water system, and assure a public water supply to each residence.

The developer has received each and every permit that it has applied for.

No permit has been denied. There has been no contention that the fees have precluded the developer from construction of the single-family residences.

Of the aforesaid fees, $1,500 is applicable to a capital contribution to the Collegeville-Trappe Joint Water System on the capital cost of constructing wells and maintaining a potable water supply. During the review process, the developer and its attorney were apprised that a study had been made by an engineering firm on behalf of the Collegeville-Trappe Joint Water System of the need to develop five potential wellsites within the Boroughs of Collegeville and Trappe for water supplies. The study further revealed that there was a need to develop the additional water resources to supply water for new developments in the

Borough and that the Borough was concerned about having the requisite margin in case of drought and for fire (R.826a-828a).

The Collegeville-Trappe Joint Water System is operated by the adjoining Boroughs of Collegeville and Trappe. The Joint Water System has functioned on a marginal yield for the past six to eight years. Under drought conditions, the impact of additional users will affect the ability of the municipality to supply water to all its residents (R.942a). The $1,500 capital contribution fee is for the construction of additional facilities which are needed for additional water supplies in the Borough (R.946a). A new well will supply approximately 330 new homes (R.940a-942a). The Delaware River Basin Commission, however, allows a municipality only to use 2/3 of the

sustainable yield of a well (R.943a). Thus, one municipal well will actually serve only 200 residences. The cost of a well is between $180,000 to $250,000 (R.955a-956a). That cost does not include the cost to treat the water if there is a water quality problem. An air stripper can cost an additional $100,000 and all new wells in the Borough have been using air strippers (R.956a). The overall cost for constructing a new well and putting it into service would be approximately $400,000 to $500,000 (R.954a). Accordingly, the potential EDU capital contribution for each residence would be $2,000 to $2,500 ($400,000 or $500,000 divided by 200 residences). The capital contribution required by the Joint Water System is only $1,500.

The Borough, through the Joint Water System, also charged a $700

tapping fee for the connection of a residence to the public water system. "Tapping" involves laying the main, installing hydrants and valves, and tapping into the existent pipe. It involves hydraulic consideration. The Joint Water System bears the cost and risk of an improper design. Where possible, the system endeavors to have loops to avoid a dead end in the system. Dead ends create stagnant water, resulting in bacterial problems and water quality considerations. The design of the Trappe Meadow System has a dead end, and the system will have to deal with that problems and rectify the same in the future at its own cost and expense (R.957a-961a).

Tapping services performed for the developer by the system include review and design of the system that is being installed, inspection of the

installation of pipe in the taps, installation of the water meter and the outside remote meter reader, and instructions to the contractor on the design and installation of the water main, fire hydrants and other component parts for the water system for the development (R.944a).

The Borough of Trappe employs a building inspector at a salary of $200 a week. Occasionally, the building inspector uses an outside architect for dealing with BOCA Code questions (R.915a-918a). The building inspector consults with the Borough Solicitor as well as the Borough Engineer (R.919a, 925a). A substantial portion of the Borough Secretary's work is related to building permit administration (R.28a). Also, a substantial portion of the Treasurer's time is engaged in the administration of building permits. The

expense of regulating building permits within the Borough of Trappe involves a portion of the telephone expenses, costs for running and operating the Borough Hall, insurance costs, copy machine expenses, office supplies, a portion of the Solicitor's fees and Engineer's fees, postage, a portion of the Treasurer's salary, a portion of the Treasurer's bond, and a portion of the Code Enforcement Officer's salary in addition to the salary of the Building Inspector (R.928a-929a, 932a).

The Borough of Trappe made a review of the costs and expenses related to the administration and supervision of the building permit ordinance. That analysis revealed that basically all the building fees were used for the administration and supervision of the building permit ordinance. The analysis also revealed that during a period of

little building in the Borough of Trappe, the Borough expends substantial monies from the general fund to supplement the fees received in order to cover costs for the administration and supervision of the building permit ordinance. Since most of the costs associated with the administration of the building permit ordinance are fixed costs, a substantial portion of the costs are incurred by the Borough regardless of the development within the municipality (R.796a-798a).

SUMMARY OF ARGUMENT

This Court has long recognized that where there is a "taking claim" made under the Fifth Amendment, the property owner has to exhaust the state remedies for just compensation. That rule is applicable regardless of whether the taking is by regulatory action or physical possession. The cases cited by

the petitioners to suggest that there is a split in the circuits on this issue do not hold that a property owner need not exhaust the state remedies for just compensation before seeking relief in federal court. The rationale for the rule requiring exhaustion is equally applicable to the possessory taking cases as for the regulatory taking cases. No novel issue is, thus, presented and the Petition should be denied.

The district court used the proper test in determing whether the ordinance of the Borough of Trappe denied the petitioners' substantive due process rights. The lower court used the rationally related test as required by numerous decisions of this Court. The petitioners improperly seek a review of the standard to be applied in this case since the issue was not preserved in the

Court of Appeals. There is no case or controversy as to another standard to be applied. The endeavor of the petitioners to have this Court mandate that a legislative body must make certain studies before legislation can be enacted would be inappropriate and contrary to the constitutional mandate of the separation of powers of the three branches of government.

ARGUMENT

1. THE PETITION SHOULD NOT BE GRANTED SINCE THE ISSUES RAISED HAVE BEEN PREVIOUSLY ADDRESSED BY THIS COURT AND NO NOVEL ISSUE IS PRESENTED.

A. This Court Has Addressed The Issue Previously As To Whether A Property Owner Must Seek Compensation Under State Procedures Prior To Asserting A Taking Claim In The Federal Court Based Upon A Claim That A Government Regulation Unconstitutionally Restricts The Use Of Land.

In *Pennell v. City of San Jose*, 485

U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d (1988), a rent control ordinance was challenged as being an unconstitutional government regulation giving rise to a taking under the Fifth Amendment. This Court declined to consider the taking claim because the ordinance provided a mechanism to impose reasonable fees and there was no showing on the record that a confiscatory rate had been in fact imposed:

> "Given the 'essentially ad hoc, factual inquir[y]' involved in the taking analysis, *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979), we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 294-295, 101 S.Ct. 2352, 2369-2370, 69 L.Ed.2d 1 (1981). In *Virginia Surface Mining*, for example, we found that a challenge to

> the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. §1201 et seq., was 'premature', 452 U.S., at 296, n. 37, 101 S.Ct. at 2370, n.37 and 'not ripe for judicial resolution,' *id.* at 297, 101 S.Ct., at 2371, because the property owners in that case had not identified any property that had allegedly been taken by the Act, nor had they sought administrative relief from the Act's restrictions on surface mining. Similarly, in this case we find that the mere fact that a Hearing Officer is enjoined to consider hardship to the tenant in fixing a landlord's rent, without any showing in a particular case as to the consequences of that injunction in the untimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here." *Id.* 485 U.S. at 10, 108 S.Ct. 856-7, 99 L.Ed.2d 13.

Petitioners claim that "this Court has, at least by implication, restricted the 'exhaustion of state remedies requirement' to Taking Claims based upon the denial of all economically viable use of the property and has not applied

this requirement to Taking Claims based upon the failure of governmental regulation to substantially advance a legitimate state interest." (Petition, p.10). Petitioners argue that the exhaustion requirement as set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) should not apply. Petitioners' assertion is flawed since there is not a taking unless there is a denial of a property right. The threshold issue in a taking claim is whether there was in fact a taking either by physical occupation or by regulatory action. See, e.g.: *Loretto v. Teleprompter Manhatten C.A.T.V. Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). To prevail in a

regulatory taking case, petitioners must first establish that the regulations, in substance, have taken a property interest. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922); *Kaiser Aetna v. United States*, 444 U.S. 164, 178, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979).

The rationale of *Williamson County Regional Planning Commission v. Hamilton Bank, supra*, is equally applicable to a regulatory taking claim. Justice Blackmun, writing for this Court, presented the rationale of first exhausting state remedies in a taking claim as follows: "A second reason the taking claim is not yet ripe is that the respondent did not seek compensation through the procedures the State has provided for doing so . . . . the Fifth Amendment does not proscribe the taking of property; it proscribes taking

without just compensation . . . . nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exists at the time of the taking." *Id.*, 473 U.S. at 194, 105 S.Ct. at 3121, 87 L.Ed.2d at 143-4.

In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), a property owner claimed that the city of San Diego had taken property by a regulatory ordinance which he claimed violated the Just Compensation Clause of the Fifth Amendment. This Court concluded that it lacked jurisdiction. There, this Court reaffirmed its long-standing decision in *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U.S. 251, 37

S.Ct. 295, 61 L.Ed.2d 702 (1917), holding that this Court will not review a taking claim until a decision has been rendered in the State Court concerning compensation. Until that decision has been made, this Court will not review the decision because it is not "final". This Court further stated that the requirement to exhaust state remedies in a taking case also applies to other remedies such as mandamus or declaratory judgment relief.[1]

B. There Is Not A Split Of Authority In Circuit Courts As To Whether An Owner Must First Seek Compensation Under State Procedures Before Asserting A Taking Claim In The Federal Court.

The cases presented by the

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[1] Petitioners have filed a petition for the appointment of a jury of view styled In Re: Trappe Meadows, Trappe Meadows, Inc. Petitioner, in the Court of Common Pleas of Montgomery County, Pennsylvania, as of No. 92-01500. The issue as to whether in fact there is a taking is presently being litigated through the state court.

petitioners in support of the proposition that there is a split of authority among the circuit courts in whether the property owner must first seek compensation under State procedures before asserting a taking claim, do not support petitioners' assertions.

The holding in the case of *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) does not establish that a property owner must first seek compensation under State procedures before asserting a taking claim in the Federal Court. Nor does the dicta in that case so support such proposition. The Ninth Circuit dismissed the claim of the developers in that case since no taking was found. Obviously, if there was no taking, there was no necessity for the property owner to seek compensation under State

procedures.

In *Leroy Land Development v. Tahoe Regional Planning Commission*, 939 F.2d 696 (9th Cir. 1991), the court again found that there was no taking since the obligation under a settlement agreement with the Tahoe Regional Planning Commission precluded an assertion of a taking. Again, neither the holding nor the dicta in the *Leroy Land Development* case supports the proposition that an owner need not seek compensation under State procedures before asserting a taking claim in the Federal court. On the contrary, the court found no merit whatsoever in the claims, and accordingly, dismissed the same.[2]

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[2] In *Leroy Land Development v. Tahoe Regional Planning Agency, supra*, the court held that the developer could not assert a "taking" under the Fifth Amendment where it had reached an agreement with the Regional Planning Authority. In this case, Trappe Meadow, Inc., had entered into a development agreement wherein it agreed to pay $25,000 for a well site and to adhere to all of the Borough ordinances.

In *Esposito v. California Coastal Council*, 939 F.2d 165 (4th Cir. 1991), the court dismissed the due process claim stating as follows:

> "In light of the plaintiffs' continued use of the property precisely as they used it prior to the passage of the Act, we are of opinion that the *Esposito* plaintiffs have not established that the regulation in question was 'so onerous that it [had] the same effect as an appropriation of the property through eminent domain or physical possession.'" *Id.* at 170.

Noteworthy is the fact that the *Esposito* court cited *Williamson Planning Commission v. Hamilton Bank, supra.* *Williamson* clearly requires an exhaustion of state condemnation proceedings before a taking claim is ripe for adjudication in the Federal Courts.

Nor does the case of *W.J. (Jack) Jones Insurance Trust v. City of Fort Smith, Arkansas*, 731 F.Supp. 912 (W.D.

Ark. 1990) support petitioners' proposition. That decision by the District Court for the Western District of Arkansas does not necessarily reflect the law of the Eighth Circuit. In that case, an injunction was sought from a denial of a building permit on a claim that the denial of the permit would constitute a "taking" in violation of the Fifth Amendment. Unlike the case sub juris, just compensation and damages were not sought.

It is submitted that petitioners misread the law applicable to this case. Where a "taking" has been asserted, and damages are sought, this Court and the circuit courts have consistently held that the "taking" claims are not ripe for adjudication until the state court condemnation proceedings have been exhausted. The rationale for the rule is that the Fifth Amendment prohibits a

taking without just compensation. In those cases where the district court or the circuit court has decided to make a finding that there was not a "taking" as a matter of law, the case was dismissed and there was no necessity to seek just compensation through the state courts. Similarly, where just compensation was not sought, as in the *W.J. (Jack) Jones Insurance Trust* case, the court dealt with the merits of the claim. The rationale for the rule does not apply where an injunction is sought as the sole remedy.

2. THE PETITION SHOULD NOT BE GRANTED SINCE THERE IS NO NEED TO CLARIFY THE STANDARD FOR DETERMINING WHETHER GOVERNMENTAL ACTION CONSTITUTES A VIOLATION OF SUBSTANTIVE DUE PROCESS.

A. The Standard Applied In This Case Is Well Within The Standard Enunciated By This Court In Its Prior Decisions.

Petitioners assert that this Court

should review the different standards that purportedly have been applied by other courts in determining whether there has been a violation of substantive due process. However, this case does not present the issue as to what standard should be applied in a substantive due process claim since the lower court clearly applied the standard as promulgated by this Court.

The standard applied by the Court in determining whether the Borough of Trappe ordinances impaired substantive due process rights of the petitioners was "whether the law is rationally related to a legitimate state interest." See Petition, A.21-23. Accordingly, the issue presented by the petitioners in this case is not viable in the context of a case in controversy since the appropriate standard was applied in this case. Thus, the issue is not

reviewable.

B. The Appropriate Standard Was Used By The Lower Court In This Case And No Further Pronouncement Is Necessary On The Rational Relation Standard Used.

In *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), this Court stated: "But the law need not be in every respect logically consistent with its aim to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the peculiar legislative measure was a rational way to correct it." Unless an ordinance is found to be "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, welfare or general welfare" its validity will be sustained. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71

L.Ed. 303 (1926).

A facial challenge to the authority of the municipality to promulgate a regulation is difficult to sustain. Not only is there a presumption of constitutionality and validity, but also the facial challenge is "the most difficult challenge to mount successfully, since the challenge must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). In that respect, "the court will not scrutinize [ordinance] provisions sentence by sentence" to ascertain the validity of a particular provision that has not been applied. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 395, 47 S.Ct. at 121, 71 L.Ed. at 314.

Clearly, this Court has refused to

encroach upon the legislative main as to the method by which it deliberates and renders its decisions. A substantive due process challenge must, by its nature, establish that the effect of the legislative enactment denies constitutionally protected rights. It would be inappropriate for this Court to determine that a legislative enactment is unconstitutional, although it has a substantial relationship to the public health, safety, and general welfare merely because the legislators, in their sole discretion and wisdom, decided not to make an analysis of socioeconomic conditions. To so hold would make the courts super legislative bodies. The very concept of separation of powers would be abridged and no longer have any meaning or effect, since the courts would determine the means and manner by which legislation could be enacted. As

stated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242-3, 104 S.Ct. 2321, 2330, 81 L.Ed.2d 186 (1984):

> "Of course, this Act, like any other, may not be successful in achieving its intended goals. But 'whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . .[state] Legislature *rationally could have believed* that the [Act] would promote its objective.' *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-672, 68 L.Ed.2d 514, 101 S.Ct. 2070 (1981); see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 66 L.Ed.2d 659, 101 S.Ct. 715 (1981); *Vance v. Bradley*, 440 U.S. 93, 112, 59 L.Ed.2d 171, 99 S.Ct. 939 (1979). When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings - no less than debates over the wisdom of other kinds of socioeconomic legislation - are not to be carried out in the federal courts."

CONCLUSION

It is respectfully submitted that

the petition for writ of certiorari should not be granted because:

(1) Homebuilders Association of Bucks/Montgomery Counties, Inc. and Trappe Meadows, Inc., petitioners, have no standing in this Court.

(2) The facts in this case do not raise the "taking" claims as asserted by the petitioners.

(3) This Court has decided the issues presented by the petitioners and no novel issue is presented by the facts of this case.

(4) The substantive due process issues have not been properly preserved.

RESPECTFULLY SUBMITTED:
SAGER & SAGER ASSOCIATES

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Counsel of Record
43 High Street
Pottstown, PA 19464
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Dated: March 24, 1992